H.R. 4315, "21ST CENTURY ENDANGERED SPECIES TRANSPARENCY ACT"; H.R. 4316, "ENDANGERED SPECIES RECOVERY TRANSPARENCY ACT"; H.R. 4317, "STATE, TRIBAL, AND LOCAL SPECIES TRANSPARENCY AND RECOVERY ACT"; AND H.R. 4318, "ENDANGERED SPECIES LITIGATION REASONABLENESS ACT"

LEGISLATIVE HEARING

BEFORE THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

Tuesday, April 8, 2014

Serial No. 113–69

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.fdsys.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

87–584 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON NATURAL RESOURCES

DOC HASTINGS, WA, *Chairman*
PETER A. DEFAZIO, OR, *Ranking Democratic Member*

Don Young, AK
Louie Gohmert, TX
Rob Bishop, UT
Doug Lamborn, CO
Robert J. Wittman, VA
Paul C. Broun, GA
John Fleming, LA
Tom McClintock, CA
Glenn Thompson, PA
Cynthia M. Lummis, WY
Dan Benishek, MI
Jeff Duncan, SC
Scott R. Tipton, CO
Paul A. Gosar, AZ
Raúl R. Labrador, ID
Steve Southerland, II, FL
Bill Flores, TX
Jon Runyan, NJ
Markwayne Mullin, OK
Steve Daines, MT
Kevin Cramer, ND
Doug LaMalfa, CA
Jason T. Smith, MO
Vance M. McAllister, LA
Bradley Byrne, AL

Eni F. H. Faleomavaega, AS
Frank Pallone, Jr., NJ
Grace F. Napolitano, CA
Rush Holt, NJ
Raúl M. Grijalva, AZ
Madeleine Z. Bordallo, GU
Jim Costa, CA
Gregorio Kilili Camacho Sablan, CNMI
Niki Tsongas, MA
Pedro R. Pierluisi, PR
Colleen W. Hanabusa, HI
Tony Cárdenas, CA
Jared Huffman, CA
Raul Ruiz, CA
Carol Shea-Porter, NH
Alan S. Lowenthal, CA
Joe Garcia, FL
Matt Cartwright, PA
Katherine M. Clark, MA
Vacancy

Todd Young, *Chief of Staff*
Lisa Pittman, *Chief Legislative Counsel*
Penny Dodge, *Democratic Staff Director*
David Watkins, *Democratic Chief Counsel*

CONTENTS

LEGISLATIVE HEARING ON H.R. 4315, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REQUIRE PUBLICATION ON THE INTERNET OF THE BASIS FOR DETERMINATIONS THAT SPECIES ARE ENDANGERED SPECIES OR THREATENED SPECIES, AND FOR OTHER PURPOSES, "21ST CENTURY ENDANGERED SPECIES TRANSPARENCY ACT"; H.R. 4316, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO IMPROVE THE DISCLOSURE OF CERTAIN EXPENDITURES UNDER THAT ACT, AND FOR OTHER PURPOSES, "ENDANGERED SPECIES RECOVERY TRANSPARENCY ACT"; H.R. 4317, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO REQUIRE DISCLOSURE TO STATES OF THE BASIS OF DETERMINATIONS UNDER SUCH ACT, TO ENSURE USE OF INFORMATION PROVIDED BY STATE, TRIBAL, AND COUNTY GOVERNMENTS IN DECISIONMAKING UNDER SUCH ACT, AND FOR OTHER PURPOSES, "STATE, TRIBAL, AND LOCAL SPECIES TRANSPARENCY AND RECOVERY ACT"; AND H.R. 4318, TO AMEND THE ENDANGERED SPECIES ACT OF 1973 TO CONFORM CITIZEN SUITS UNDER THAT ACT WITH OTHER EXISTING LAW, AND FOR OTHER PURPOSES, "ENDANGERED SPECIES LITIGATION REASONABLENESS ACT"

Tuesday, April 8, 2014

U.S. House of Representatives

Committee on Natural Resources

Washington, DC

The committee met, pursuant to notice, at 10:04 a.m., in room 1324, Longworth House Office Building, Hon. Doc Hastings [Chairman of the Committee] presiding.

Present: Representatives Hastings, Bishop, Lummis, Benishek, Tipton, Gosar, Southerland, Flores, Mullin, Daines, Cramer, LaMalfa; Holt, Grijalva, Costa, Huffman, Shea-Porter, and Garcia.

The CHAIRMAN. The committee will come to order. Today we are having a legislative hearing on H.R. 4315, the "21st Century Endangered Species Transparency Act"; H.R. 2316, the "Endangered Species Recovery Transparency Act"; H.R. 2317, the "State, Tribal, and Local Species Transparency Recovery Act"; and H.R. 4318, the "Endangered Species Litigation and Reasonable Act." The Chair notes a presence of a quorum.

I ask unanimous consent that Mr. Neugebauer from Texas be allowed to sit in the committee and participate in the hearing.

[No response.]

The CHAIRMAN. Without objection, so ordered. And the same courtesy would be applied to Mr. Huizenga, if he also wants to come and testify.

We will begin now with opening statements, as confined to the Chairman and Ranking Member. However, I ask unanimous consent that any Member who wants to have a statement appear in the record have it to the committee before the close of business today. And, without objection, so ordered.

I will now recognize myself for 5 minutes.

STATEMENT OF THE HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

The CHAIRMAN. Today marks the legislative phase of updating, improving, and modernizing the Endangered Species Act for the 21st century. It is a product of years of Committee oversight on this 40-year-old law, which was last reauthorized 26 years ago, in 1988.

Last year I, along with my colleague from Wyoming, Mrs. Lummis, created the Endangered Species Act Congress Working Group. It is comprised of Republican Members from affected States nationwide. This group held forums and received hundreds of public comments from all sides.

In February the working group released its final report with more than 20 recommendations. The group found that while there is strong support for conserving endangered species, there are key areas where improvements could be made to make the law more effective for both species and for people. Today's bills reflect some of those recommended improvements.

I have said it has never been my intent to introduce a sweeping overhaul of the Endangered Species Act. I don't believe that is the best way to go forward. Instead, the focus needs to be on thoughtful, sensible, and targeted proposals. We have those before us today.

First is a bill I introduced, H.R. 4315, the "21st Century Endangered Species Transparency Act." This legislation simply requires that data used by Federal agencies for ESA listing decisions be made publicly available and accessible through the Internet. The last significant update to ESA was when the Internet was in its infant stages. Posting data, supporting key ESA decisions online will greatly enhance transparency and is something, frankly, that should have been done a long time ago.

In my own Central Washington district, the Fish and Wildlife Service, rather than using actual DNA data, based its decision to list a plant called a bladderpod largely on publicly inaccessible data from a 2006 unpublished manuscript. Other examples include the Federal Government's citation to taxpayer-funded studies that conclude without actual data that listing the greater sage-grouse across 11 Western States is warranted.

Now, whether one agrees with the conclusions that I just cited or not, refusing to make tax-funded data available to the American public flies in the face of transparency and good science.

H.R. 4317, the "State, Tribal, and Local Species Transparency and Recovery Act," sponsored by our colleague from Texas, Mr. Neugebauer, would enhance State, local, and tribal involvement in ESA decisions. This bill would require that before any listing decision is made, the Federal Government must disclose all data used to States affected by such actions. This gives States the opportunity

to verify, dispute, or complement such information, and encourages a stronger role for States and species conservation policies.

The bill also ensures that data from local, State, and tribal entities—those are the governments closer to the ground—be included in ESA listing decisions.

H.R. 4316, the "Endangered Species Recovery Transparency Act," sponsored by Mrs. Lummis, would require the administration to track and make available online the millions of taxpayer dollars being spent on ESA-related litigation, to give American people clear information about the time and resources currently used to address ESA-related lawsuits.

And the final bill, introduced by Mr. Huizenga from Michigan, would reduce taxpayer-financed attorney fees to help ensure that resources for species protection are focused more on species than on lucrative legal fees. It puts in place the same reasonable hour caps on attorney fees used in another Federal law, the "Equal Access to Justice Act." This common-sense bill would help reduce the often current exorbitant taxpayer-funded fees, often upwards of $500 an hour, and make them limited to the hourly rate for attorneys that prevail against the Federal Government at $125 an hour. This is in line with the Equal Access to Justice Act.

And just last week, at the Appropriations Committee hearing, the Director of Fish and Wildlife acknowledged that there could be—and I will quote—"opportunities to make incremental improvements" to the ESA. And that is exactly what we are doing here, in a manner that I hope will be bipartisan.

These bills provide a starting point for this committee's legislative efforts on the Endangered Species Act. Moving forward with these simple, narrowly focused proposals would help bring needed transparency for significant Federal ESA decisions for both people and for species.

[The prepared statement of Mr. Hastings follows:]

PREPARED STATEMENT OF THE HONORABLE DOC HASTINGS, CHAIRMAN, COMMITTEE ON NATURAL RESOURCES

Today marks the legislative phase of updating, improving, and modernizing the Endangered Species Act for the 21st century. It is the product of years of committee oversight on this 40-year-old law that was last reauthorized in 1988.

Last year, I along with Rep. Cynthia Lummis, created the Endangered Species Act Congress Working Group. Comprised of Republican Members from affected districts nationwide, this group held forums and received hundreds of public comments from all sides.

In February, the Working Group released its final report with more than 20 recommendations. The Group found that while there is strong support for conserving endangered species, there are key areas where improvements could be made to make the law more effective for both species and people. Today's bills reflect some of those recommended improvements.

I've said it has never been my intent to introduce a sweeping overhaul of the ESA. I don't believe that's the best way forward. Instead, the focus needs to be on thoughtful, sensible, and targeted proposals. We have those before us today.

First is a bill I introduced, the 21st Century Endangered Species Transparency Act. This legislation simply requires that data used by Federal agencies for ESA listing decisions be made publicly available and accessible through the Internet. The last significant update to the ESA was when the Internet was in its infant stages. Posting data supporting key ESA decisions online will greatly enhance transparency, and is something that should have been done long ago.

In my own central Washington district, the Fish and Wildlife Service, rather than using actual DNA data, based its decision to list a plant called the bladderpod largely on publicly inaccessible data from a 2006 "unpublished" manuscript. Other exam-

ples include the Federal Government's citation to taxpayer-funded "studies" that conclude, without actual data, that listing the Greater Sage Grouse across 11 western States is warranted. Whether one agrees with the conclusion or not, refusing to make taxpayer-funded data available to the American public flies in the face of transparency and good science.

H.R. 4317, the State, Tribal, and Local Species Transparency and Recovery Act, sponsored by Rep. Neugebauer, would enhance State, local and tribal involvement in ESA decisions. This bill would require that *before* any listing decision is made, the Federal Government must disclose all data used to States affected by such actions. This gives States the opportunity to verify, dispute, or complement such information and encourages a stronger role for States in species conservation policies. The bill also ensures that data from local, State and tribal entities—those closest to the ground—be included in ESA listing decisions.

H.R. 4316, the Endangered Species Transparency Act, sponsored by Rep. Lummis, would require the administration to track and make available online the millions of taxpayer dollars being spent on ESA-related litigation to give the American people clear information about the time and resources currently used to address ESA-related lawsuits.

The final bill, introduced by Rep. Huizenga, would reduce taxpayer-financed attorney fees to help ensure that resources for species protection are focused more on species than on lucrative legal fees. It puts in place the same reasonable hourly caps on attorney fees used in another Federal law, the Equal Access to Justice Act. This common sense bill would help reduce the often current exorbitant, taxpayer-funded fees—often upwards of $500 per hour—and make them limited to the hourly rate for attorneys that prevail against the Federal Government at $125 per hour. This is in line with the Equal Access to Justice Act.

Last week, at an appropriations hearing, the Director of the Fish and Wildlife Service acknowledged that there could be "opportunities to make incremental improvements" to the ESA. That is exactly what we're doing here, and in a manner that, I hope will be bipartisan.

These bills provide a starting point for this committee's legislative efforts on the ESA. Moving forward with these simple, narrowly focused proposals would help bring needed transparency for significant Federal ESA decisions for both species and people.

The CHAIRMAN. And, with that, I will recognize the distinguished Ranking Member, Mr. Grijalva.

Mr. GRIJALVA. Thank you very much, Mr. Chairman, and thank you for yielding.

STATEMENT OF THE HON. RAÚL GRIJALVA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. GRIJALVA. After numerous hearings and a partisan task force which concluded that the Endangered Species Act is a failure because it has not recovered enough species, we now have before us four bills that would create red tape, divert agency resources, and dictate what data constitutes the best available science, regardless of whether the data is, in fact, the best, or even scientific. None of these bills will actually lead to the recovery of more species.

The pattern of this committee with respect to ESA has been all too familiar to other issues we have before us. Partisan hearings, excessive document demands from agencies that require thousands of man-hours to address, the all-Republican task force, and, yesterday, another subpoena for Fish and Wildlife Service, which, by now, must be feeling pretty popular with the Natural Resources Committee.

Finally, today we consider four bills that have been before—that have been developed with no consultation with the Democrats. Ironically, a few of these bills have concepts that—some changes could probably be supported. But, as drafted, they have significant

problems. If the past is a prologue, there will be no effort to try to make the changes that will garner bipartisan support, and the Majority will just move forward to mark up, because, as we all know, they have the votes.

This, unfortunately, is not the way to successfully legislate. And unchanged, these bills will very likely go the way of the dodo bird. No real progress will be made to improve agency efficiency and increase recovery rates for species or to truly improve transparency in a way that benefits citizens, agencies, and the species. Perhaps that is what the other side wants: the ability to endlessly attack ESA and repeat accusations that have been around for decades, that environmentalists are getting rich off ESA lawsuits and species are not recovering.

The fact is, like it or not, ESA is one of the most important environmental laws of our time, and protecting endangered species is broadly supported by the public. When the father of ESA, Congressman John Dingell, introduced his bill in 1973, species were disappearing at an accelerated rate. As Mr. Dingell noted then, and is still true today, the protection of endangered species is far more than a matter of aesthetics. Once a species is gone, it is gone. When we fail to protect endangered species, as then-Committee Chairwoman Margaret Sullivan noted, we tinker with our own futures, and run risks whose magnitudes we barely understand, if at all.

Does the recovery of species take time? Of course it does. Species that end up on the list are those that have been driven to the brink, but saved from extinction after decades of habitat loss and degradation or, in the case of the wolf, a concerted extermination effort. Were it not for ESA, however, scientists estimate that more than 200 species would have gone extinct in the time since the law's passage. Moreover, when comparing the actual recovery rate of listed species to the recovery plans that have been developed under the law, 90 percent of the listed species are recovered at a rate that was expected in the plan.

We have a duty and a responsibility to protect all creatures, great and small. And I cannot support legislative initiatives that will undermine that goal. If the Republicans want to improve recovery, increase transparency in a manner that truly benefits species, we are prepared to talk. If this effort is just another talking point on the too-much-regulation or sue-and-settle agenda, however, the discussion will be unproductive and short.

With that, Mr. Chairman, thank you, and I yield back my time.

The CHAIRMAN. I thank the gentleman for his opening statement, and I am very pleased to recognize our first panel. We have Dr. Rob Roy Ramey from Nederland, Colorado, who is with the Wildlife Science International. We have The Honorable Kel Seliger, State Senator from Amarillo, Texas; Dr. Steve Courtney, Associate for the National Center for Ecological Analysis and Synthesis, from Santa Barbara, California; Mr. Michael Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks for the U.S. Department of the Interior, here, in Washington, DC; Mr. Sam Rauch, Deputy Assistant Administrator for Regulatory Programs for the National Marine Fisheries Service at the U.S. Department of

Commerce, here, in Washington, DC; and The Honorable Tom Jankovsky, Commissioner of Garfield County, Colorado.

For those of you who have not had the opportunity to testify in front of the committee, we ask all of you to submit a written statement, which you all did. And that will be part of the record. However, with your oral remarks, I would ask very much that you keep them within the 5-minute time period. And that timing light in front of you is how we kind of keep score here. When the green light is on, it means you are doing extremely well. When the yellow light comes on, it means that you are coming to the end of your 5 minutes. And then, when the red light comes on, that means that the 5 minutes are over. So, I would ask you to end your remarks before that red light comes on, if you can do that. And if we do that, we will have plenty of time, hopefully, for questions.

So, with that, I want to introduce first Dr. Rob Roy Ramey, II, from Nederland, Colorado. And you are recognized for 5 minutes, Dr. Ramey.

Dr. RAMEY. Thank you, Chairman.

STATEMENT OF ROB ROY RAMEY II, PH.D., WILDLIFE SCIENCE INTERNATIONAL, NEDERLAND, COLORADO

Dr. RAMEY. Thank you, Chairman. This hearing today considers modest bills that seek to correct several longstanding issues with transparency and prioritization of conservation effort in administration of the Endangered Species Act.

The first bill, H.R. 4315 (Hastings), would restore the public's right to know by providing public access to the data that are the basis of ESA decisions. H.R. 4315 is also consistent with a long trend of legislation on the openness and transparency of government. In 1982, congressional amendments to the Endangered Species Act required that listing decisions be based upon data, rather than opinion or information.

Subsequent legislative expansions of the public's right to know including the Shelby Amendments and circular A110, from the Office of Management and Budget, to require that all data produced under a Federal award be made public; the Freedom of Information Act in 2000; the Federal Advisory Committee Act, also in 2000; and the Data Quality Act in 2001, for which all the agencies have produced policies.

This tradition of openness continued in 2009, with President Obama's executive order requiring greater openness under the Freedom of Information Act. "The presumption of disclosure also means that agencies should take up affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens of what is known by their government, and disclosures should be timely."

Moreover, within the scientific community, an increasing number of scientific journals require that the data be archived and publicly available. The benefits of making data public and independent review are obvious. Here are a few of the benefits recognized by the National Institutes of Health and National Academy: reinforcing open scientific inquiry, encouraging a diversity of analysis and opinion, promoting new research, testing of new or alternative

hypotheses, enabling exploration of topics not envisioned by the original investigators, permitting the creation of new data sets by combining data sets from multiple sources, and promoting new ways of looking at problems.

Just as maintaining scientific progress to benefit human health, these same reasons apply to solving problems with ecosystem health facing endangered species. And withholding data does not further the goal of species recovery.

Despite a trend toward openness in virtually all other areas of government, many far-reaching ESA listings and regulatory decisions are being made without the opportunity for independent analysis of the underlying data. The ESA is sorely in need of updating in this regard. And the services are working from an outdated model.

Should the U.S. Fish and Wildlife Service and National Marine Fisheries Service be making far-reaching decisions based upon data that are not publicly available, and even data that they and peer reviewers retained by them have not seen? I don't think so.

Now, what about the criticisms of this bill? In my 34 years of experience working with endangered species in the wild, the risks of data disclosure are overstated. Most of the data we are talking about reveals nothing about specific locations that would put plants and animals at risk. Measurements, genetic data, mortality data, disease data, behavioral data, experimental data, past locations recalling an animal's move from one place to another, their sex, age, and number. These don't put the animals at risk. And in cases where there are regularly used nest sites, water sources, and these are host to human activity, and a documented risk exists, seasonal closures are an effective tool for protection.

The purported risk of poaching or harassment of wildlife is a red herring. It has been my direct experience that if the public knows where nests are, or the water sources are, it can be counted on to protect them from trespass and harm. It has also been my experience that poaching is a crime of opportunity and chance. It is not one facilitated by data mining. And there are severe penalties for poaching, and that includes felonies.

Now, the privacy of land owners is something of concern to all of us. And that could be protected in the same way that privacy of individuals involved in clinical trials and medical research can be protected, through the use of legally binding, non-disclosure data-sharing agreements. And these are in wide use.

In conclusion, I do see one grave risk to this openness and proposed data disclosure. It is to those who have sought to maintain their power, money, and authority by withholding scientific and financial data from the public, and this comes at the cost of recovering species.

And just a few words on H.R. 4316 and 4318. I think in 1978, when the Supreme Court interpreted the language of the ESA to conclude that listed species must be protected at whatever the cost, they weren't referring to paying out exorbitant lawyers' fees. Thank you very much.

[The prepared statement of Mr. Ramey follows:]

PREPARED STATEMENT OF ROB ROY RAMEY II, PH.D., WILDLIFE SCIENCE INTERNATIONAL, NEDERLAND, COLORADO ON H.R. 4315, H.R. 4316, H.R. 4317, AND H.R. 4318

> *"There is, to begin with, the kind of secrecy that everyone deplores but that is fostered by institutional cultures of self-interest, both public and private—when scientific facts that the public has a right to know are intentionally hidden and knowingly withheld to preserve the economic or political standing of powerful organizations."*
>
> Sheila Jasanoff, John F. Kennedy School of Government, Harvard University.

The hearing today considers bills that seek to correct several long-standing issues with transparency and prioritization of conservation effort in administration of the Endangered Species Act (ESA). The bills would restore the public's *right to know* when it comes to ESA decisions; ensure cooperation with State, local, and tribal governments; and ensure that the public's funds go where they are needed most—to species conservation rather than into lawyers' pockets.

As a biologist who has dedicated a 34-year career to the conservation of endangered species, and who has risked life and limb on countless occasions to save endangered species in the wild, I support these bills. While the details of these bills may be discussed and debated, the need for them is unquestionable.

H.R. 4315, (Hastings), "21st Century Endangered Species Transparency Act"

The first bill, H.R. 4315, addresses a subject that I have written extensively about in scientific papers and in previous testimony before this committee, on August 1, 2013. I include a copy of that testimony as an attachment in support of my testimony today, however, let me reiterate several key issues and address several concerns raised by critics.

First, the ESA requires that decisions to list species as threatened or endangered, and enact regulatory actions to aid their recovery, be made "*solely on the basis of the best available scientific and commercial data*." However, Federal agencies actually rely on published and unpublished studies, and professional opinion, rather than the underlying *data* used in the studies. This means that many far-reaching ESA listing and regulatory decisions are being made without an opportunity for independent analysis and verification of the underlying data upon which the cited studies are based.

Second, when data are not publicly accessible, legitimate scientific inquiry is effectively eliminated as no third party can independently reproduce the results. Such secrecy does not further the goal of species recovery. Such secrecy also puts the evidentiary basis of some resource agency decisions outside the realm of science and in clear violation of the Information Quality Act. And finally, it has the effect of concentrating power, money, and regulatory authority in the hands of those who control access to the data.

Third, peer review is not a panacea. It is a useful but imperfect filter on information quality and not a substitute for public access to the underlying data that allows for an independent, third party review.

Fourth, there are precedents that support the archiving of data that is being proposed in this bill. Several publicly accessible data repositories exist on the Internet, as well as traditional museum and library archives where data may be archived without charge. Additionally, a growing number of scientific journals require that the data be published with the paper or deposited in an online archive. As an example, data archiving and sharing policies that have been developed by the National Institutes of Health are straightforward and address many of the issues raised by critics for similarly requiring data archiving and sharing of data used as the basis of ESA decisions. (https://grants.nih.gov/grants/policy/data_sharing/data_sharing_faqs.htm#902).

And finally, as I was asked in previous testimony, "Are there situations where public access to data should be limited, such as revealing the locations of endangered species?" To that question I answered, "In most cases, this threat is overstated. However, in those situations where there is a legitimate concern (i.e., where poaching has been clearly documented), the risk should be weighed against the potential benefits of more effective management aiding species recovery. If the risk of disclosure is real, then the solution is to allow only '*narrowly drafted exceptions to the general rule of open access*' as '*broad exceptions tempt agencies and other decisionmakers to shield their programs from criticism*' (Fischman and Meretsky 2001)." One widely used mechanism that allows for data sharing when disclosure has risk or data are considered proprietary, is the use of legally binding, non-disclosure/data sharing agreements. These are in widespread use in the medical research fields and

examples can be downloaded from the websites of major research universities (i.e. MIT, Cornell, Yale).

As noted by Jasanoff (2006) "Important legislative expansions of the public's right to know and assess information used by the government include: the Freedom of Information Act, 5 U.S.C. § 552 (2000), the Federal Advisory Committee Act, 5 U.S.C. app. § § 1–15 (2000), and the Data Quality Act, a rider to the Treasury and General Appropriations Act for Fiscal Year 2001, Pub. L. No. 106–554, § 515, 114 Stat. 2663 (2000)." To this list, I add the Shelby Amendment to the Omnibus Appropriations Act for FY 1999, Pub. L. No. 105–277, 64 FR 5684 (Feb. 4, 1999) which amended OMB Circular A–110 to require that Federal awarding agencies ensure that all data produced under an award are made available to the public through the procedures established under the Freedom of Information Act. H.R. 4315 is consistent with that legislative trend of openness and transparency.

H.R. 4317, (Neugebauer), "State, Tribal, and Local Species Transparency and Recovery Act"

The next bill, H.R. 4317, addresses a long-standing frustration experienced by State, local, and tribal governments I have worked with, at having their data and plans effectively ignored by the Fish and Wildlife Service (USFWS) unless the agency was forced to do otherwise (i.e. through litigation). We are currently seeing this issue play out on the lesser prairie chicken, that was just listed by the USFWS, as well as Gunnison and greater sage grouse, whose decisions are pending. In all of these cases, the data and the plans were developed with substantial expenditures of earnest effort. However, there is no guarantee that superior local data will be considered by the USFWS as best available scientific and commercial data in its decisionmaking.

A poignant example comes from Dolores County, Colorado. It is the poorest county in that State and facing devastating economic consequences with a potential listing of the Gunnison sage grouse. That proposed listing has crippling economic consequences because most of the county, including the town of Dove Creek and most of its agricultural land, was mapped and proposed as critical habitat by the USFWS. The county commissioned an independent GIS analysis of critical habitat, which found (using higher resolution data) large areas of non-habitat mapped as critical habitat and submitted comments to the USFWS pointing out these problems. However, given the experience of other counties whose mapping efforts have been ignored, the County is not hopeful.

Commissioner Tom Jankovsky of Garfield County, Colorado can describe a similar situation there, where their sage grouse habitat is naturally fragmented by topography and vegetation, but the agencies treat it as if it were contiguous habitat, and have ignored the County's superior mapping efforts.

Perhaps even more disturbing is that fact that there is no mechanism for the USFWS to cooperate with State, local, and tribal governments in development of conservation plans and provide assurances that proposed conservation efforts will meet the standards of the Policy for the Evaluation of Conservation Efforts When Making Listing Decisions (PECE policy). Essentially, State, local, and tribal governments find out whether their hard work has paid off only at the time of a listing decision. That is a disincentive for investing conservation efforts. This bill could make a difference in providing a mechanism whereby greater assurance is provided in advance.

H.R. 4316, (Lummis), "Endangered Species Recovery Transparency Act"

I applaud the intent of H.R. 4316 to track the funds expended to respond to ESA lawsuits, including the number of employees dedicated to litigation, attorney's fees awarded in the course of ESA litigation and settlement agreements. To this I would add the requirement that these expenditures also be tracked by species, and that ESA expenditures at other Federal agencies be tracked as well, so that the public can determine the total Federal cost of implementing the ESA. Such data would go a long way toward setting priorities.

H.R. 4318, (Huizenga), "Endangered Species Litigation Reasonableness Act"

And finally, I have a few words to say about H.R. 4318, (Huizenga). In 1978, the U.S. Supreme Court interpreted language of the ESA to conclude that listed species must be protected "*whatever the cost*." However, I do not think the Supreme Court was referring to "*whatever the cost*" applying to exorbitant, run-away lawyer's fees. This bill will reprioritize expenditures so that they will do the most good for species recovery.

Literature Cited

Fischman, R.L., and V.J. Meretsky. 2001. Endangered species information: access and control. *Washburn Law Journal* 41:90–113.

Jasonoff, S. 2006. Transparency in public science: purposes, reasons, limits. *Law and Contemporary Problems*. Duke University.

Ramey, R.R. 2013. U.S. House of Representatives, Committee on Resources. Oversight Hearing on: "Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People." (Provided oral and written testimony.) 1 August 2013.

Attachment A

TESTIMONY OF ROB ROY RAMEY II, PH.D.

BEFORE THE COMMITTEE ON NATURAL RESOURCES, OVERSIGHT HEARING ON "TRANSPARENCY AND SOUND SCIENCE GONE EXTINCT?: THE IMPACTS OF THE OBAMA ADMINISTRATION'S CLOSED-DOOR SETTLEMENTS ON ENDANGERED SPECIES AND PEOPLE," HELD AUGUST 1, 2013

"A democracy requires accountability, and accountability requires transparency."

Barack Obama (from *Memorandum for the Heads of Executive Departments and Agencies*, on the subject of the Freedom of Information Act)

My Qualifications

I am an independent scientist with 33 years of experience in conservation, research and management of threatened and endangered wildlife. Having worked on many species, including peregrine falcons; California condors; desert, Sierra Nevada, and Rocky Mountain bighorn sheep; argali sheep of Asia; meadow jumping mice; sage grouse; delta smelt and African elephants, I am well aware of the scientific issues surrounding species listing and recovery. I earned a Ph.D. from Cornell University in Ecology and Evolutionary Biology; a master's degree from Yale University in Wildlife Ecology; and a bachelor's degree in Biology and Natural History from the University of California Santa Cruz, and postdoctoral experience included research at University of Colorado, Boulder and as a visiting scientist at the Center for Reproduction of Endangered Species at the San Diego Zoo. After 5 years as Curator of Vertebrate Zoology at the Denver Museum of Nature & Science, I served as a consulting Science Advisor to the Office of the Assistant Secretary of the Interior in Washington, DC. I am member of the Caprinae Specialist Group at the International Union for the Conservation of Nature (IUCN) and serve as a science advisor to the Council for Environmental Science, Accuracy, and Reliability (CESAR). I consult on endangered species scientific issues and conduct scientific research with Wildlife Science International, Inc.

I bring to your attention two key transparency issues with the implementation of the U.S. Endangered Species Act. These are issues that undermine legitimate conservation efforts, waste scarce conservation dollars, and impose ineffective regulatory burdens on the public. In the worst cases, they can harm the very species they were intended to protect. I also provide potential solutions that I think both sides of the aisle may find agreement on.

ISSUE 1: MOST ESA DECISIONS ARE NOT BASED UPON PUBLICLY AVAILABLE DATA

The U.S. Endangered Species Act (US–ESA) requires the U.S. Fish and Wildlife Service (USFWS) make decisions to list species as threatened or endangered, and enact regulatory actions to aid the recovery of species, "*solely on the basis of the best scientific and commercial data available*" (16 U.S.C. 1531 et seq.). Although referred to as *data*, the USFWS actually relies on published and unpublished studies, and professional opinion, rather than the underlying *data* the cited studies are based upon (see http://www.fws.gov/informationquality/ and the Department of Interior's Scientific Integrity policies (DOI 2011)). Despite having adopted the Office and Management and Budget Information Quality Guidelines which require transparency in studies used in regulatory decisionmaking, currently, neither the USFW, nor the National Marine Fisheries Service have a requirement that data relied upon in decisionmaking be publicly available.

Resource agency reliance on the papers and reports which summarize results and contain the opinions of scientists, rather than the underlying *data*, as specifically required by the ESA, has created an untenable situation where:

1. Far-reaching ESA listing and regulatory decisions are being made without an opportunity to independently analyze the underlying data and assumptions upon which the cited studies are based.
2. Resource agencies have effectively replaced the scientific method in implementation of the ESA (i.e., data, hypothesis testing, and reproducible results) with the opinions expressed by the authors of the cited studies, especially when those opinions are erroneously represented as if they were rigorously tested against the data.

What are the effects of this lack of transparency on the public? When data are not publicly accessible, legitimate scientific inquiry is effectively eliminated as no third party can independently reproduce the results. This action puts the evidentiary basis of some resource agency decisions outside the realm of science and in clear violation of the Information Quality Act. Furthermore, it has the effect of concentrating power, money, and regulatory authority in the hands of those who control access to the data (Ramey 2012).

That is neither transparent nor is it democratic; it relies on authority.

There are sound reasons to question such authority. Key studies used in decision-making on the greater sage grouse, Gunnison sage grouse, boreal toad, Prebles meadow jumping mouse, coastal California gnatcatcher, delta smelt, desert bighorn sheep, and hookless cactus have one of more of the following: mathematical errors, missing data, errors of omission, biased sampling, undocumented methods, simulated data used when more accurate empirical data were available, discrepancies between reported results and data, misrepresentation of methods, arbitrarily shifting thresholds, inaccurate mapping, selective use of data, subjective interpretation of results, fabricated data substituted for missing data, or no data at all. Clearly, the agency's scientific peer review process that should have caught these errors is not as effective as it is portrayed to be.

It has been my experience that when data has not been provided to the agencies, then obtaining access to data held by researchers, even after publication, can be difficult, if not impossible. As the following responses to data requests illustrate, seeking data can frequently resembles a shell game:

> *"It is very possible that this data set does not exist any longer."*
>
> *"The USFWS data was deliberately provided in a format that would not facilitate a detailed analysis by those unfamiliar with the manner in which it was collected."*
>
> *"Unfortunately we cannot provide you with the raw data you have requested at this time."*
>
> *"We categorically do not release this information to anyone including the United States Fish & Wildlife Service and the California Department of Fish and Game."*

While some researchers have been responsive to data requests, others simply ignore our data requests altogether. Some researchers apparently feel a need to control access to the data, determining if, when, and to whom it will be released, sometimes years after the data were collected. However, many of these studies were permitted and/or funded by the USFWS (or other source of Federal funding) through grants, contracts, or cooperative agreements. Therefore, it follows that the data should be public, yet there is no consistent requirement from the USFWS that the data be public or provided to the agency.

This problem is more widespread than one might initially think. In a notable case, colleagues at the California Fish and Game (CDFG) had to track down and net-gun endangered desert bighorn sheep from a helicopter so they could manually download data from the GPS radio collars (that provide precise locations at regular time intervals). They were forced into this extreme course of action because a researcher had reset the access codes on the collars so only *he* could download the data remotely, and the researcher refused to share the data with the CDFG who needed it for management of the population (Dr. V. Bleich, CDFG retired and K. Brennen, pers. comm). Funding for purchase of the GPS radio collars was provided by the USFWS for use by the researcher.

In two other cases (coastal California gnatcatcher and desert bighorn sheep in the Peninsular Ranges) a court order was required to obtain the data.

Clearly, the public interest in having timely access to data overrides perceived ownership of data by some researchers. As noted by ESA scholars, Fischman and Meretsky (2001):

> *"In addition to the rapid responses often needed to recover endangered species, most research in conservation biology is also distinguished by a dependence on*

government resources. The funding for research; the scientific permits allowing researchers to collect, harass, or harm animals; the permission for access to public lands; and the regulation controlling activities to ensure continued existence of imperiled species all point to the pervasive public interest in the resulting information. This public claim for access countervails the customary control researchers exert over data they collect."

In my experience, recovery of threatened and endangered species is most effective when there is active scientific debate and discussion about the best courses of action to identify and ameliorate threats, and how to devise more effective conservation measures. Such urgency requires open and timely access to data.

A solution to this issue is neither difficult, nor costly. There are publicly accessible data repositories (i.e. GenBank for DNA sequences and Dryad for general purpose data archiving http://datadryad.org/), as well as traditional museum and library archives where data may be archived without charge. All that is needed is a requirement the data be archived prior to the agency relying on the report or paper in its decisionmaking, and that the data (both raw and final data sets) and methods are provided in sufficient detail to allow third party reproduction.

Are there situations where public access to data should be limited, such as revealing the locations of endangered species? In most cases, this threat is overstated. However, in those situations where there is a legitimate concern (i.e., where poaching has been clearly documented), the risk should be weighed against the potential benefits of more effective management aiding species recovery. If the risk of disclosure is real, then the solution is to allow only "*narrowly drafted exceptions to the general rule of open access*" as "*broad exceptions tempt agencies and other decisionmakers to shield their programs from criticism*" (Fischman and Meretsky 2001).

ISSUE #2: PEER REVIEW IS NOT A PANACEA

Peer review is a useful but imperfect filter on information quality. However, it is not a substitute for public access to the underlying data that allows for an independent, third party review.

Despite the best of intentions, there are no guarantees that peer reviewers will be provided access to data, or that if data is provided, it will be used in developing their review. As previously noted, peer reviewers do not always catch errors of significance. Moreover, as detailed in my previous testimony to the committee (Ramey 2007), if there was a bias or selective presentation of information by the USFWS to peer reviewers, the outcome of the peer review can be less than objective. And finally, despite agency assurances, there is no guarantee that reviewers will be free of conflict of interest or will deliver an impartial assessment. The reasons for this are summarized in the following excerpt from my recent paper, *On The Origin of Specious Species* (Ramey 2012):

"The problems that lead to these issues [with peer review] *are three fold. First, the number of experts involved with a particular species is often limited. Whole careers are sometimes dedicated to the study of a species (or subspecies or population), and a listing can produce what is perceived as needed "protection" for that species under the ESA. Additionally, ESA listings can have the effect of putting these experts into positions of power, money, and authority, through their roles on Recovery Teams, Habitat Conservation Plans, and consulting as USFWS "approved biologists." Because few ESA-listed species are ever delisted, this guarantees a virtual lifetime of employment on one's favorite species. Thus, experts used in peer review may also be advocates, or have an emotional, ideological, or financial stake in the proposed listing."*

"Second, a network of individuals who work on a particular species (or issues common to several species) can form powerful "species cartels." These social networks can influence the peer review process, provide a united front to advocate for particular decisions, and repress the publication of information that does not agree with their positions." It has been my experience that the FWS and NMFS typically rely on species specialists, which exacerbates this problem.

"And third, the use of other Federal biologists in peer review, especially those from the USFWS and the USGS-Biological Resources Division (USGS–BRD), cannot be viewed as conflict free. The increasing codependency of the USFWS and USGS–BRD, results in a growing and previously unrecognized conflict of interest in science used in support of ESA decisions and the use of USGS biologists as peer reviewers on information used in ESA decisions. This extends to the role of USGS biologists who serve as editors and reviewers for scientific journals, and who peer review highly influential scientific information used in ESA decisions."

To avoid the pitfalls of peer review described above, the solutions are relatively straightforward:

1. To ensure that peer reviews are transparent, conducted in an objective and consistent manner, that the underlying data are both available and analyzed by reviewers, and that potential conflicts of interest are clearly identified, accountability is required: make failure to comply with Information Quality Act an arbitrary and capricious action on the part of the agency.
2. Ensure that that all agency sponsored and administered peer reviews, including those conducted internally by biologists at the USGS, be public information if they are relied upon by the USFWS or NMFS.
3. Require that the USFWS and NMFS identify and make available online all information including contrary information that it has received.

CONCLUSIONS

The American people pay for data collection and research on threatened and endangered species through grants, contracts, cooperative agreements, and administration of research permits. They pay the salaries of agency staff who collect data, author, edit, and publish papers based upon those data. They, for the most part, are willingly regulated based on those data. It is essential that the American people have the right to full access to those data in a timely manner, as it is in the public interest. A requirement that data and methods be provided in sufficient detail to allow third party reproduction would raise the bar on the quality and reproducibility of the science used in ESA decisions and benefit species recovery. Failure to ensure this level of transparency will undermine the effectiveness of the very programs that the data were gathered for in the first place.

It should not take a subpoena (or intrepid, net-gun toting State biologists leaping from helicopters) to obtain data that should be public under the ESA.

Accountability is needed in the implementation of Information Quality Act, particularly in regard to public access to data and the peer review process.

Qualified third party reviews have the potential to reduce the workload of agencies, and improve the caliber of regulatory actions.

The ongoing "bio-blitzkrieg" of ESA listing petitions, lawsuits, and settlement agreements does a disservice to bona-fide conservation efforts. Every time another species is added to the list of threatened and endangered species, or a new deadline is imposed by litigants, the resources to recover species becomes more thinly spread. Throwing more money at the problem is not the solution, nor is allowing decision-making by fiat. The solution is to ensure that the scientific evaluations are done properly the first time, and that means relying upon data and objective application of the scientific method, as required by the ESA.

Literature Cited

DOI. 2011. Integrity of Scientific and Scholarly Activities. Department Manual. Part 305, DM, Chapter 3:1–38. Office of the Deputy Secretary, Department of Interior. available at http://www.doi.gov/scientificintegrity/index.cfm. Accessed October 2, 2012.

Fischman, R.L., and V.J. Meretsky. 2001. Endangered species information: access and control. *Washburn Law Journal* 41:90–113.

Ramey, R.R. 2007. Written testimony submitted to the U.S. House of Representatives, Committee on Natural Resources, for the Legislative Hearing on: "*Crisis of Confidence: The Political Influence on Agency Science and Decision-Making*." July 31, 2007.

Ramey, R.R. 2012. On the Origin of *Specious* Species. Chapter 4, In: Institutions and Incentives in Regulatory Science. J. Johnston (ed.), Lexington Books. Pp. 77–97.

The CHAIRMAN. Thank you very much, Dr. Ramey, for your testimony. I will now recognize the gentleman from Texas, Mr. Neugebauer, for purposes of introduction.

Mr. NEUGEBAUER. Thank you, Chairman Hastings, and thank you for your—and I appreciate you allowing me at this hearing today to consider—take the opportunity—H.R. 4317, which is the "State, Tribal, and Local Species Transparency and Recovery Act."

We know better decisions are made when you have the best facts. One of the things—Fish and Wildlife—the States and the stakeholders the data—to make those determinations. At the same time, give States the opportunity to furnish data to Fish and Wildlife—decisions.

And so, I think this is a proactive approach, and I appreciate—hearing today—want to make sure that we are—working toward the—of the species, as well at the same time acting—and so, I think this is a—, and I think—

It is my honor to welcome not only a friend, but—from Texas. Kel represents 37 counties, and there are only 254 counties in Texas. And so, when I say that Seliger represents Texas, I mean he represents Texas. He is a former mayor of Amarillo, Texas. But, more importantly, while he has been in the Senate he has been very involved in the Endangered Species, its impact on Texas, its impact on—So, it is my privilege to recognize Mr. Seliger, Senator Seliger.

The CHAIRMAN. Senator Seliger, you are recognized for 5 minutes.

STATEMENT OF THE HON. KEL SELIGER, A U.S. SENATOR FROM THE STATE OF TEXAS

Mr. SELIGER. Mr. Chairman, ladies and gentlemen, thank you very much for the opportunity to talk to you today about the State's role in the process of endangered species. I particularly appreciate Congressman Neugebauer's interest and work in this area, because it is very important. The district that I represent produces 20 to 25 percent of the Nation's oil and gas, and a substantial amount of the Nation's cotton, grain sorghum, wheat, corn, beef, milk, and pork.

Two years ago I chaired an Odessa, Texas, hearing of our Natural Resources Committee to deal with the dune sage brush lizard. And there were two overarching, I think, fundamental principles that came out of the hearing. One, any determinations under the Endangered Species Act should be based upon good science, scientifically reliable science that provides clear measures of what the problem is, what the potential solution is, and what the effects of the remedies are.

The other thing that we found out—and some of the largest independent producers of oil and gas in the country were there, all people who own or have rights on substantial acreages in West Texas and New Mexico—was that nobody wanted to be responsible for the extinction of any species, however physically small and insignificant that they may be. And I think that is particularly important because, at the end of the day, the way I understand the Endangered Species Act, it is about the protection or restoration of the species, not just a settlement of litigation.

The States' engagement, I think, is critical, because that is where so much of the science is generated that will be used. In the case of the dune sage brush lizard, which we believe is in a unique habitat in West Texas and Southern New Mexico, there may be more than one, but the primary authority is a State employee, a Professor Lee Fitzgerald at Texas A&M University, whose research has been very transparent and peer reviewed.

And the pathways to success vary by States. And I think that is particularly important. In the case of the dune sage brush lizard there are mitigation credits by land set-asides. When it comes to the lesser prairie chicken, there are five States involved in that habitat: Texas, New Mexico, Oklahoma, Kansas, and Colorado. And they have set aside large amounts of property. And it is just a different way to do it. But each species may require a different solution, and those solutions may be specific and characterized by the presence in those States.

There are 168 million acres in Texas, 95 percent of which is privately held. In the United States as a whole, only 30 percent of the land is owned by the Federal Government. The rest in those States is privately held. Largely in the West, we look at areas that have large land areas, be it the Permian Basin or the Great Plains, or whatever.

Most of the States—certainly in the case of Texas, Colorado, and Oklahoma—there are parks, wildlife, wildlife fishery organizations, that have tremendous scientific assets in which to do the research to make sure that it is transparent, as it must be, as State agencies, and to see to it that the remedies work, because they are the ones who will provide the empirical measures to show us what the effects are of those measures used.

In the case of the lesser prairie chicken, 35 companies enrolled over 4 million acres. In the case of the dune sage brush lizard, private companies put up about $2 million to pay for the research that would be done in the State of Texas, under the auspices of Fish and Wildlife Service, to see to it that the research was good, effective, and transparent.

But the overall point of the whole thing is endangered species is meant to serve a specific purpose: the protection, restoration, if necessary, of species, and the restoration and maintenance of habitat.

The end goal is not simply the settlement of litigation, but to have a positive effect on species possibly affected. Thank you very much.

[The prepared statement of Mr. Seliger follows:]

PREPARED STATEMENT OF THE HON. KEL SELIGER, A U.S. SENATOR FROM THE STATE OF TEXAS ON H.R. 4317

Thank you for the opportunity to address the Committee on Natural Resources. I am pleased to support the "State, Tribal, and Local Species Transparency and Recovery Act," H.R. 4317 by Congressman Randy Neugebauer. Current law clearly directs the Secretary of the Interior to "cooperate to the maximum extent practicable with the states" when carrying out the Endangered Species Act, and for good reason (16 U.S.C. 1535(a)). State fish and wildlife agencies have the necessary jurisdiction, resources, and imperative relationships with businesses and landowners to create comprehensive wildlife action plans that can preclude the listing of a species. No one wants a species to be listed; the method for preservation of the species is at the center of the debate. The entities that are best suited to take on this role are the States themselves. Timely and meaningful coordination between State and Federal agencies is imperative in order to preserve potentially endangered species.

Second, a definition of "best scientific and commercial data available" that includes information obtained by the States is essential. It is the essence of local control to not only allow, but also to empower and rely on the local jurisdiction to have the most current data and best understanding of the issue at hand. To forgo information from State fish and wildlife agencies, who are in the field each and every day, simply does not make sense. The U.S. Fish and Wildlife Service should engage

State agencies early and communicate efficiently and effectively throughout the entire review of a species.

The CHAIRMAN. Thank you very much, Senator Seliger. I will now recognize Dr. Steven Courtney, Associate for the National Center for Ecological Analysis and Synthesis from Santa Barbara, California.

That is a long title, I might say. Don't say it quickly, but you are recognized for 5 minutes.

STATEMENT OF STEVEN P. COURTNEY, ASSOCIATE, NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS, SANTA BARBARA, CALIFORNIA

Dr. COURTNEY. Thank you. Thank you, Mr. Chairman. I am Steven Courtney, I am a principal scientist at Western EcoSystems Technology, Inc. (WEST)—based in Cheyenne, Wyoming, and an associate at NCEAS, based in Santa Barbara. I am a biologist with 22 years working with ESA on behalf of private, tribal, State, and Federal clients. My particular expertise is in designing and implementing peer review, fact finding, other processes for difficult or controversial situations. That includes, a few years ago, leading a synthesis on a little critter called the Northern Spotted Owl, which I think the Chairman may have heard of. I also worked on a science process that helped to diffuse the headwaters controversy in northern California, the Columbia, the Missouri, the Rio Grande, the Klamath, Sacramento, and a few other places. And most recently, I led the review on Fish and Wildlife Services' proposal to delist the gray wolf. For my day job I work on greater sage-grouse and advise both private and State clients.

So, you can see that I am not an expert on any one issue or any region. Instead, I help those who are trying to develop efficient and science-based solutions, and to design transparent processes that are aimed at determining best available science. So my comments here are really on those two issues, on the role and value of transparency, and how we can ensure that the decisions of Federal agencies are based on best science.

While we all agree that transparency is pretty much a good thing, and it increases the likelihood that we will get new ideas, it increases the likelihood that any mistakes can be found and corrected, and, most importantly perhaps, it increases the likelihood that stakeholders will be able to understand the reasons for agency decisions. But it is important to distinguish between scientific information and use of that information in a deliberative process.

I would argue that attempts to improve ESA decisionmaking for increased transparency could more usefully be targeted. For instance, when setting up an evaluation process to understand the status of the spotted owl, I was very careful, given the history of that controversy, to be as transparent as possible. The science groups met in public, stakeholders were invited to attend those meetings and to present information. And, ultimately, the process led to a change in Federal management of the Northwest forests, as our work showed that major threats were not just in the harvest, but invasion of—by barred owls and catastrophic wildfires.

Essentially, the same process has been followed in many other situations. And the processes that I run, reviewers are not anonymous, there is a record of how information is used and weighed and evaluated, and then of how decisions are reached.

So, when science-based decisions are discussed openly and fairly, there is a greater engagement by all sectors, enhanced cooperation, less litigation, and, I believe, better decisionmaking. So, transparency of process is very important, and fair and open explanations of decisions can also be quite valuable.

But complete transparency could be detrimental. I represent private clients whose information on timber inventory or mineral deposits—they would be very upset if that information became public, and if their ability to access those resources due to endangered species constraints also became public.

So, I encourage and recommend that the committee consider how to encourage transparency when it would be helpful, primarily in ensuring the process is open and fair and as clear as possible; and second, in encouraging decisionmakers to set forth the rationale for their decisions.

Turning now to H.R. 4317 regarding best available science, I will only state that I believe that it is always important to reach best available science, and that there are techniques in place to do that, including peer review, joint fact finding, other things like that. And we do catch and—advise Federal scientists on the need for change. And most recently on the gray wolf, perhaps. And I would argue that legally defining best available science cannot be effective in swaying the minds of scientists themselves, who will continue to evaluate science based upon tried and trusted criteria, such as falsifiability, replicability, and the weight of evidence. And I would encourage you to make use of existing techniques. Thank you.

[The prepared statement of Dr. Courtney follows:]

PREPARED STATEMENT OF DR. STEVEN P. COURTNEY, ASSOCIATE, NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS (NCEAS), SANTA BARBARA, CALIFORNIA ON H.R. 4315 AND H.R. 4317

I am Steven Courtney, Principal Scientist at Western EcoSystems Technology, Inc. (WEST) and Associate at the National Center for Ecological Analysis and Synthesis (NCEAS). For the past 40 years, I have been a biologist, with 22 years of working with the Endangered Species Act. This experience has included work on behalf of private, tribal, State, and Federal clients, on many different species and ecosystems. My particular expertise is in designing and implementing peer review, fact-finding, and other processes to enhance understanding of science and related issues within the context of difficult or controversial situations. A sampling of this work includes:

- Leading a synthesis of Spotted Owl biology that identified current threats to that species;
- The science process that helped resolve and defuse the Headwaters controversy in northern California;
- Reviews of water management on the Missouri, Columbia, and Rio Grande Rivers, and in the Everglades and the Edwards Aquifer;
- Investigations of allegations of scientific malpractice against Federal scientists in the Sacramento delta and the Klamath Basin; and
- Most recently, leading a review of the use of science by the U.S. Fish and Wildlife Service (USFWS) regarding de-listing the wolf.

Currently, most of my work concerns range management and conservation of sage-grouse, advising private and State clients, as well as the USFWS.

I have been privileged to work on many systems. Without being an expert on any one species or region, I have, instead, been engaged first hand on a wide variety

of the issues faced around the country regarding management of wildlife and natural resources. I have strived to help those looking for efficient and science-based solutions under the Endangered Species Act (ESA), in particular, by designing transparent processes aimed at determining the 'best available science'. My comments on the four bills before you are focused on those two issues: what is the role and value of transparency; and how can we ensure that the decisions of Federal agencies are based on the best science?

TRANSPARENCY

Science depends on the clear and fair evaluation of information. In the context of the ESA, decisions made by regulatory agencies, (USFWS and NOAA-Fisheries), as well as other parallel decisions taken by action agencies (such as the U.S. Army Corps of Engineers (USACE), the U.S. Forest Service (USDA–FS), and the bureaus within the Department of the Interior) depend critically on the quality of the scientific evaluations they carry out. Increasing the transparency of such scientific assessments has the potential to increase their quality. Transparency encourages the consideration of new or alternative ideas, and it increases the likelihood that mistakes will be corrected. Of course, one of the key advantages of increasing transparency is that stakeholders can see the basis for agency decisions.

On the face of it, transparency would appear to be straightforward and a positive attribute. However, my experience with diverse systems suggests a need for caution and careful application and design of transparent disclosure of information. In particular, it is useful to distinguish between scientific information itself, and the use of that information in a deliberative process. Attempts to improve ESA decisionmaking through increased transparency need to be targeted and carefully designed in order to avoid negative effects on commercial activity and on conservation.

When setting up an evaluation process to understand the status of the Spotted Owl, I was careful, given the history of that controversy, to be as transparent as possible. The science group met in public, and stakeholders were invited to attend these meetings and to present information. All meetings were recorded, and the technical deliberations among the scientists became part of the administrative record. In this way, we ensured that any party could understand our reasoning, and see how we reached our conclusions. Ultimately, that process led to a change in Federal management of northwest forests, as our work showed that loss of habitat to invasive Barred Owls and to wildfire were major threats comparable to the impacts of timber harvest.

Essentially the same process has been followed in many other situations. For reviews on the Everglades, the Missouri, or wolf-delisting, there is no secrecy regarding the process. Reviewers are not anonymous, and there is a record of how information is weighed and evaluated, and then participants provide a record of how decisions are reached. We make an effort to ensure that stakeholders understand the evaluation process, and how to contribute to these processes, and, likewise, we explain our reasoning and the rationale for final assessments. This openness has proven to be both popular and effective. When science-based decisions are discussed openly and fairly, there is greater engagement by all sectors; enhanced cooperation; less impetus for litigation; and (I believe) better decisionmaking.

By contrast, a lack of clarity can cause problems. In 2011, I was asked to evaluate allegations of scientific misconduct against Interior employees on the Sacramento Delta. While the investigative panel found no evidence of misconduct (and found that the employees had followed good scientific procedure), we did determine that they had not explained clearly the rationale for their decisions. That lack of an open explanation and of how they reached their evaluations led to significant misunderstandings and frustrations.

In short, transparency of process is important, and fair and open explanations of decisions can be valuable. I commend the interest in transparency by this committee. However, in some situations, complete transparency can be detrimental. Many landowners, for instance, regard information about wildlife on their lands to be proprietary. Full and transparent disclosure of such information could have significant financial impacts. For instance, information on the presence of Spotted Owls and of the quality of their forest habitat can readily be used by outsiders to predict a company's timber inventory and the likelihood of the company being able to harvest that resource. Similarly, a company with significant populations of a listed species might be unable to access mineral resources. If such detailed information on a species' distribution were to be made generally available, it could impact the company significantly, creating an advantage to competitors, potentially decreasing shareholder confidence, and so on. In short, release of such proprietary information is often opposed by such landowners, for good reason. Requiring full transparency

in such situations can also deter landowners from participating in constructive conservation agreements with the USFWS or other agencies.

The possibility of complete transparency of data is a potential threat to conservation planning. Many landowners may be unwilling to even enter into discussion with USFWS regarding Conservation Banks, or Conservation Credit systems, if there is a belief that all information will become public. The innovative conservation exchange system for the Lesser Prairie Chicken acknowledges this wariness on the part of landowners and allows habitat evaluations to be carried out by independent third parties, precisely to assure landowners that their private information will remain private. Many species listed under the ESA, and many others that may be considered for listing, occur predominantly on private lands. For such species, the goodwill of landowners is imperative, and their concerns for privacy of information cannot be ignored.

Two of the bills before this committee, H.R. 4315, and H.R. 4317, discuss the importance of transparency. I recommend that the committee consider how to ensure that transparency is encouraged in those areas where it would be helpful. This is primarily in two realms—first, in ensuring that the process used in scientific assessments is as open, fair, and clear as possible; second, in encouraging decisionmakers clearly to set forth the rationale for their decisions, including the information on which the decision was based and why that information is relevant and deemed to be the best available information.

BEST AVAILABLE SCIENCE

Let me now turn to the matter of best available science. H.R. 4317 specifically addresses one of the lynchpins of ESA—that actions by NOAA-Fisheries and USFWS must be based on the 'best scientific and commercial data available.' Many existing policies and management programs of the two regulatory agencies are aimed at ensuring that the statute is followed and that 'best available science' is identified and used. Hence, internal and external reviews, consultations with affected parties (including Tribal Nations, States, and other Federal agencies), collaborative conservation efforts, and other policies all aim to improve the use by USFWS and NOAA-Fisheries of good science. Specific tools and programs, such as peer review and Structured Decision Making, are similarly designed to identify and use best science.

To the extent that H.R. 4317 would codify consultation with States and tribes, it appears duplicative of existing programs and efforts; however, if H.R. 4317 results in the data from States and tribes being defined as either the 'best available' or equal in quality to other 'best available' information, it would undermine the existing intent under ESA that science (whatever its source) be fairly evaluated in an impartial manner, and only then that the 'best available science' be employed in decisionmaking.

Generally, Federal agencies receive judicial deference on scientific and technical issues. This deference reflects the expertise of the agencies on such matters. Nevertheless, Federal scientists are not infallible; there exist numerous programs to take corrective actions, or to use 'adaptive management' to improve the quality and use of science. While stakeholders (including States and tribes) may be dissatisfied with individual agency actions, there are already mechanisms available for review and consultation and techniques and tools by which the decisions of Federal agencies can be examined and amended by the agency concerned. Encouraging the wider use of such cooperative and engaged approaches would likely meet the objectives of stakeholders and enhance both transparency and the application of best available science.

In 2000, I led a program designed to address a seemingly intractable debate—whether deepening the shipping channel of the Columbia River would harm endangered fish. The opinions of three regulatory agencies (NOAA, USFWS, and EPA), of the action agency (USACE), and of numerous stakeholders (including States and tribes) were in conflict. The parties agreed to a neutral and impartial process, in an attempt to resolve their differences over interpretation of the science. Over the course of 7 months, the parties met and debated the science in public, with the guidance of a team of nine eminent scientists. New science was commissioned. At the end of the process, there was an unequivocal result and finding: deepening of the channel would not harm the fish. In this case, entrenched positions were abandoned, a cooperative program was adopted, and Federal scientists were willing to change their opinions.

Late last year, I helped carry out an independent peer review of some of the science underlying the USFWS's proposal to de-list the Gray Wolf under the ESA. A panel of independent scientists was convened by NCEAS at the request of the

USFWS. In the course of their review, the panelists unanimously concluded that the USFWS's position on the taxonomy and genetics of wolves was not rooted in the 'best available science'. Note that the USFWS has not yet made a final determination on its proposal, and, thus, it is not yet clear how this scientific finding will be used. Nevertheless, the fact that the USFWS sought and received truly independent review, which did then not concur with the agency's position, is indicative that we already have processes in place that can identify situations when corrective action may be warranted.

There are many other examples where stakeholder input can help improve decisionmaking by Federal agencies. To name just one, the wind energy/wildlife guidelines, developed with the aid of a Federal Advisory Committee, are widely acknowledged to be a good, scientifically based program.

Legislation that re-defines what constitutes 'best available science' cannot be effective in swaying the minds of scientists themselves, who will continue to evaluate science based upon tried and trusted criteria such as logical consistency, replicability and the weight of evidence. Efforts to improve Federal decisionmaking under ESA may instead be best served by programs that provide opportunity and resources for increased consultation and collaborative assessments. The Columbia River program in 2000 cost some $500,000; the recent wolf peer review, much less. There are many options for improving the availability of programs to improve scientific evaluations, scaling from standing FACA committees, to once-off public meetings, to small scale document reviews. All of these may have value when used appropriately, and all are currently available to the agencies concerned.

LITERATURE

Review of Proposed Rule Regarding Status of the Wolf Under the Endangered Species Act. 2014. National Center for Ecological Analysis and Synthesis.

Science Review of Testimony in the Delta Cases; Summary Report 2013 Atkins and RESOLVE.

Evaluation of Scientific Information regarding Preble's Meadow Jumping Mouse 2007 SEI.

Scientific evaluation of the status of the Northern Spotted Owl 2004 SEI.

Reducing Uncertainty and Risk: Peer Review of the Potential Impact of Dredging and Disposal on At-Risk Salmonids in the Lower Columbia River Estuary, 2001 SEI.

Comprehensive Guide to Studying Wind-energy Wildlife Interactions. National Wind Coordinating Collaborative 2011.

Lesser Prairie Habitat Exchange (documents at http://www.thehabitatexchange.org/species/lesser-prairie-chicken/).

The CHAIRMAN. Thank you very much, Dr. Courtney. I will next recognize Mr. Michael Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks at the U.S. Department of the Interior, here, in Washington, DC.

And, Mr. Bean, you are recognized for 5 minutes.

STATEMENT OF MICHAEL BEAN, COUNSELOR TO THE ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. BEAN. Thank you, sir. Chairman Hastings, Representative Grijalva, members of the committee, I am Michael Bean, Counselor for Fish, Wildlife, and Parks at the Interior Department.

I want to begin by noting that the Fish and Wildlife Service is committed to the use of the best science available in its ESA listing decisions, as the law requires it to do. The Service is also committed to transparency in its decisionmaking processes.

In furtherance of that goal of transparency, it is the established practice of the Fish and Wildlife Service to make available the relevant scientific and commercial data on which it relies when making listing decisions. That data is generally maintained in the field

offices that have the lead for those listing decisions. In addition, a list of literature, studies, and other relevant data, and copies of pivotal documents are posted on regulations.gov.

Service listing decisions are carefully crafted, fully explained, and copiously documented, addressing each of the factors that Congress has specified as relevant to those listing decisions.

We are pleased that the bills under consideration today seek to further the goals of science-based decisionmaking and transparency. We do not, however, support them in their current form, for reasons that I will explain.

Let me begin by noting that we strongly agree that States, the data from States, is often the best available data for us. Because of the extensive experience and responsibilities of the States, the ESA already directs the Service to carefully consider the information that States provide. The Service must take into account the work of the States in its listing decisions. And the Service must provide the States with a written explanation whenever it makes a listing decision at odds with the recommendations of a State.

However, not all States have responsibilities or programs for all the types of species eligible for ESA listing: in particular, plants and invertebrates. For species such as these, for example, the best available data may come from universities, museums, conservation organizations, and industry. For counties and tribes, the situation is more varied. In most States, the jurisdiction and responsibility for wildlife rests with the State, not with the counties, which generally have no research programs related to ESA listing decisions.

Given these facts, it is apparent that the question of what constitutes the best available data should turn on an evaluation of the data itself, and not who provided it. To presume at the outset that the data from a particular source will always constitute the best available data would negate the very purpose of requiring the use of the best available data. Moreover, it is clear that data from States, counties, and tribes cannot all constitute the best available data when the data from these sources are in conflict, as they sometimes are.

Frequently the publications, studies, and reports on which the Service relies are based upon underlying data collected and maintained by the States, who control access to it. State law sometimes stringently restricts the release of certain wildlife data, as does the State of Texas, for example. There are a variety of reasons why the States choose to limit access to wildlife data: either it reveals the location of sensitive species, could expose those species to collecting, disturbance, or vandalism. In addition, States often depend upon private land owners who give them access to their lands to gather wildlife data. Maintaining that access may mean respecting the land owner's desire to avoid unwanted trespassers, poachers, or simple curiosity-seekers.

The bottom line, however, is that the raw data underlying the publications, reports, and studies on which the Service routinely relies may not ever be in the possession or control of the Service. Thus, to the extent that H.R. 4315 is intended to require the Service to post such data on the Internet, it may create an obligation impossible to fulfill, and provide yet a new basis for challenging the validity of listing or de-listing decisions.

Finally, with respect to the two bills concerning litigation costs, it is not clear that they would have the effect of allowing more resources to be devoted to conservation, but may instead have the opposite effect. With respect to all four bills, we would be pleased to work with the committee to find effective ways of addressing the issues raised by those bills. Thank you, Mr. Chairman.

[The prepared statement of Mr. Bean follows:]

PREPARED STATEMENT OF MICHAEL J. BEAN, COUNSELOR TO THE ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR ON H.R. 4315, H.R. 4316, H.R. 4317, AND H.R. 4318

Chairman Hastings, Ranking Member DeFazio, and members of the committee, I am Michael J. Bean, Counselor to the Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior (Department). I appreciate the opportunity to testify before you today regarding four bills to amend the Endangered Species Act of 1973 (ESA). Although the Department cannot support these four bills in their current form, the Service recognizes the importance of data transparency and availability and is willing to work with the committee to address the issues that the bills raise.

OVERVIEW OF THE ENDANGERED SPECIES ACT

The ESA provides a critical safety net for America's native fish, wildlife, and plants. And we know it can deliver remarkable successes. Since Congress passed this landmark conservation law in 1973, the ESA has prevented the extinction of hundreds of imperiled species across the Nation and has promoted the recovery of many others—like the bald eagle, the very symbol of our Nation's strength.

Earlier this year, the Service published a proposal to recognize the recovery of, and to remove from the protection of the ESA, the Oregon chub, a fish native to rivers and streams in the State of Oregon. The recovery of the Oregon chub is noteworthy because it is attributable in significant part to the cooperation of private landowners who entered into voluntary conservation agreements to manage their lands in ways that would be helpful to this rare fish. In some cases, landowners agreed to cooperate in reintroducing the fish into suitable waters on their property. The help of private landowners and the cooperation of State and Federal partners were critical to the success in bringing this fish to the point at which it is no longer endangered and no longer in need of the protection of the ESA.

The recovery of the Oregon chub has taken a little more than 20 years of sustained effort. That is a relatively speedy timeframe within which to undo the effects of what are often many decades of habitat loss and degradation and the other threats that are responsible for the endangerment of many species. For example, the recovery and delisting of the bald eagle was the culmination of a 40-year conservation effort. The Aleutian Canada goose recovery took 34 years. Efforts to recover the whooping crane have been under way since the 1940s when fewer than 20 cranes remained. Those efforts have been dramatically successful, with a wild population today of several hundred birds. Likewise, the California condor and black-footed ferret, both of which were so perilously close to extinction that no individuals of either species survived in the wild, have made extraordinary progress. Today condors and ferrets have been successfully bred in captivity and reintroduced to the wild, where they have successfully produced wild-born offspring. Despite the dramatic progress toward recovery that each of these species has made, the whooping crane, California condor and black-footed ferret are still endangered species and will likely remain so for many more years. That is the virtually inevitable consequence of waiting until a species has been greatly depleted before beginning efforts to recover it, as is the case for most species protected under the Endangered Species Act.

As the Oregon chub example makes clear, private landowners can hasten the recovery of endangered species through their cooperative efforts. The Oregon chub is just one of many endangered species that landowners are helping recover through voluntary agreements with the Service known as "safe harbor agreements." These agreements provide participating private property owners with land-use certainty in exchange for actions that contribute to the recovery of listed species on non-Federal lands. Safe harbor agreements with Texas ranch owners have helped restore the northern aplomado falcon to the United States, from which it had been absent for roughly a half century. In the southeastern United States, more than 400 landowners have enrolled nearly 2.5 million acres of their land in safe harbor agreements for the endangered red-cockaded woodpecker. These landowners have effec-

tively laid out the welcome mat for this endangered bird on their land, as a result of which populations of this endangered bird are growing on many of these properties. Many others are doing similarly for other endangered species.

Thus, the Endangered Species Act provides great flexibility for landowners, States and counties to work with the Fish and Wildlife Service on voluntary agreements to protect habitat and conserve imperiled species. Through Safe Harbor Agreements, Candidate Conservation Agreements, Habitat Conservation Plans, Experimental Population authority, and the ability to modify the prohibitions on take of endangered species in Section 9 by crafting special rules for threatened species under Section 4(d), the Act allows and encourages creative, collaborative, voluntary practices that can align landowner objectives with conservation goals.

H.R. 4315 AND H.R. 4317: DATA QUALITY AND ACCESSIBILITY

If enacted, H.R. 4315, the 21st Century Endangered Species Transparency Act, would establish a requirement to make publically available on the Internet the best scientific and commercial data that are the basis for each listing determination. If H.R. 4317 were enacted, the State, Tribal, and Local Species Transparency and Recovery Act would amend the ESA to require FWS provide States with all data used in ESA Section 4(a) determinations prior to making its determination, and define "best available scientific and commercial data" to include all data submitted by a State, or tribal or county government.

"Best Available" Data

The decisions that the Fish and Wildlife Service makes with respect to listing or delisting of species must be made "solely on the basis of the best scientific and commercial data available." Congress added this explicit directive in 1982, in response to the perception that some listing decisions then were being influenced by non-scientific considerations. Congress made clear then that the threshold decision of whether a species is endangered or threatened is a scientific judgment to be informed by the best available information alone.

Often, the States are among the best sources of such information, particularly with respect to game and other actively managed species. However, some States lack authority or programs to conserve certain species that are eligible for protection under the Endangered Species Act, such as invertebrates and plants, and therefore collect insufficient data. Counties and other units of local government generally have neither jurisdiction nor programs to manage wildlife. For all of these reasons, the best available scientific information may come from such sources as universities, museums, conservation organizations, and industry. Thus, to define "best scientific and commercial data available" as always including data submitted by a State, tribal or county government—as H.R. 4317 does—may not always be accurate. Section 4(b)(1) of the Act already requires the Service to take into account the efforts and views of States and their political subdivisions when making listing decisions, and Section 4(i) requires the Service, if it makes a listing determination at odds with the recommendations of a State, to provide that State with a written explanation of the reasons for doing so. Finally, it should be noted that defining all data submitted by States or counties as the "best available," would create a quandary if there were conflicting data from such sources. A concrete recent example concerned several counties in Kansas who took strong exception to the conservation plan for the lesser prairie-chicken that the State proposed. The counties and the State took diametrically opposed positions based on conflicting data. In this example, both cannot be the "best available."

As noted, the studies, reports, and research publications by State agencies or their employees are often the best studies and analyses available to the Service. A broad-ranging requirement to post on the Internet this State data—particularly if that requirement extends to the raw data underlying such studies and analyses—would almost certainly elicit a number of well-considered concerns from the States themselves. Those concerns would start with the fact that in some instances State law prohibits the release of certain wildlife data. For example, Texas Government Code Section 403.454 prohibits the disclosure of information that "relates to the specific location, species identification, or quantity of any animal or plant life" for which a conservation plan is in place or even under consideration.

Even where there is no State law barrier to releasing the raw data underlying State studies, there are many reasons why States would be reluctant to have that data widely disseminated via the Internet. To the extent that such data reveals the location of rare or sensitive species, its disclosure would put such species at added risk, both from collectors or vandals as well as from people with entirely innocent motives, such as the desire to get an up-close photo of an eagle and its young in their nest, or of prairie-chickens displaying on their mating grounds.

The ability of States, and of scientific researchers generally, to gather wildlife data often depends upon the willingness of private landowners to grant them access to their lands. Many landowners can reasonably be expected to be less likely to grant such access if they know that the data collected on their land would be posted on the Internet. Their concerns might include the well-being of the wildlife on their land as well as their own sense of privacy and desire not to have to contend with trespassers, vandals, and simple curiosity seekers. The disclosure requirement that the sponsors of H.R. 4315 intend to produce better scientific data could have the unintended consequence of reducing the amount and quality of such data. While the Service is willing to explore other approaches, it has generally found satisfactory to most States and researchers its current records management process. As part of that process, the Service makes available all of the relevant scientific and commercial data that it has and on which it relies in making a listing determination under Section 4(a)(1) of the ESA. The data is generally maintained at the field office that is the lead for making the listing determination. Additionally, a list of literature, studies, and other relevant data used in making the determination and copies of pivotal documents are posted on Regulations.Gov, the government Web site for electronic records and public comments. These documents are generally made available to the public electronically upon request. However, there may be limitations to the release of certain data if it falls within one of the exceptions to disclosure under the Freedom of Information Act (for example, the Service sometimes obtains from the Defense Department certain high resolution photographs that the Department requests not be released to the public because of national defense considerations). In these cases, the Service refers the requester to the party from which the data originated. Further, in many circumstances, such as peer-review published literature, FWS relies on a synthesis or analysis of data that is summarized by the prevailing scientific expert or author of the paper. In such circumstances, FWS relies on the expert evaluation and analysis of the data and may not have in its possession or be able to obtain the underlying data.

H.R. 4316 AND H.R. 4318: LITIGATION REFORM

The Endangered Species Recovery Transparency Act, H.R. 4316, would require the Secretaries of the Interior and Commerce to provide an annual report to Congress detailing litigation expenditures from agencies within their respective Departments within 90 days of fiscal yearend. Agencies would need to provide the Secretary with detailed information, including a description of the claims; the amounts of resources expended responding to notices of intent to sue letters and all other actions in preparation of or related to litigation, as well as attorney's fees awarded and the basis for such awards. H.R. 4318, the Endangered Species Litigation Reasonableness Act would limit the hourly rate for prevailing attorney fees to $125 per hour, thereby focusing resources on conservation and recovery rather than litigation. In consultation with Department of Interior's Solicitor's Office, we find it is unclear whether the amendment as drafted would actually amend the ESA to place a cap on fees and awards and, even if it did, considering the complex interplay between the provisions of the Equal Access to Justice Act and the Endangered Species, whether doing so would have the intended effect.

The Service would like to explore with the committee whether there are administratively easier means of tracking and reporting fee awards than what has been proposed.

CONCLUSION

In closing, Mr. Chairman, America's fish, wildlife, and plant resources belong to all Americans, and ensuring the health of imperiled species is a shared responsibility for all of us. In implementing the ESA, the Service endeavors to adhere rigorously to the congressional requirement that implementation of the law be based strictly on science. At the same time, the Service has been responsive to the need to develop flexible, innovative mechanisms to engage the cooperation of private landowners and others under the Endangered Species Act and other laws, both to preclude the need to list species where possible, and to speed the recovery of those species that are listed. The Service remains committed to conserving America's fish and wildlife by relying upon the best available science and working in partnership to achieve recovery. Thank you for your interest in endangered species conservation and ESA implementation, and for the opportunity to testify.

The CHAIRMAN. Thank you very much, Mr. Bean, for your testimony. Next I will recognize Mr. Sam Rauch, Deputy Assistant Administrator for Regulatory Programs for the National Marine Fisheries Service, Department of Commerce, here, in Washington, DC. Recognized for 5 minutes.

STATEMENT OF SAM RAUCH, DEPUTY ASSISTANT ADMINISTRATOR FOR REGULATORY PROGRAMS, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, WASHINGTON, DC

Mr. RAUCH. Good morning, Mr. Chairman, members of the committee. Thank you for the opportunity to testify before you today. My name is Sam Rauch, and I am the Deputy Assistant Administrator for Regulatory Programs at the National Marine Fisheries Service. We jointly administer the Endangered Species Act with the Fish and Wildlife Service, and our focus is mainly on ocean species and Pacific salmoides, as they go inland.

The purpose of the Endangered Species Act is to conserve threatened and endangered species and their ecosystems. Congress passed the law on December 28, 1973, recognizing that the natural heritage of the United States was of aesthetic, ecological, educational, recreational, and scientific value to our Nation and its people.

It was understood that, without protection, many of our Nation's living resources would become extinct. The Endangered Species Act has been successful in preventing species extinction. Less than 1 percent of the species listed under the law have gone extinct, and over 30 species have recovered.

The National Marine Fisheries Service has recently de-listed the eastern population of Steller sea lions. This is the first de-listing for our agency that has occurred because of recovery since 1994, when we de-listed the now-thriving eastern population of Pacific gray whales.

Actions taken under the Endangered Species Act have also stabilized or improved the downward population trend of many marine species. For example, in 2013 we saw record returns of nearly 820,000 adult fall Chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the most fall Chinook salmon to pass the dam in a single year, since the dam was completed in 1938, and more than twice the 10-year average.

Recovery of threatened and endangered species is a complex and challenging process. We are engaged in a range of activities under the Endangered Species Act that include listing species and designating critical habitat, consulting on Federal actions that may affect a listed species or its designated critical habitat, and authorizing research to learn more about protected species.

We also partner with a variety of stakeholders, including private citizens, Federal, State, and local agencies and tribes, and interested organizations and industry that have been critical to implementing recovery actions and achieving species recovery goals.

For example, several NMFS programs provide support to our partners to assist with achieving recovery goals. From 2000 to 2012, the Pacific Coastal Salmon Recovery Fund provided almost

$1 billion in funding to support partnerships in the recovery of listed salmon and steelhead.

From 2003 to 2013, the Species Recovery Grants to States awarded 37 million to support State recovery and research projects for other listed species. And from 2001 to 2013, the Prescott Program awarded over $44.8 million in funding through 483 grants to Stranding Network members to respond and care for stranded marine mammals.

The National Marine Fisheries Service is dedicated to the stewardship of living marine resources through science-based conservation and management. The Endangered Species Act is a mechanism that helps guide our conservation efforts, and reminds us that our children deserve the opportunity to enjoy the same natural world we experience.

We are currently analyzing the four legislative proposals that were recently introduced into the House of Representatives regarding the Endangered Species Act, and we would be happy to work cooperatively with you on these draft bills.

Thank you again for the opportunity to discuss the implementation of the Endangered Species Act, and I am available to answer any questions you may have.

[The prepared statement of Mr. Rauch follows:]

PREPARED STATEMENT OF SAM RAUCH, DEPUTY ASSISTANT ADMINISTRATOR FOR REGULATORY PROGRAMS, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE ON H.R. 4315, H.R. 4316, H.R. 4317, AND H.R. 4318

INTRODUCTION

Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to testify before you today. My name is Sam Rauch and I am the Deputy Assistant Administrator for Regulatory Programs for the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) in the Department of Commerce. NMFS is dedicated to the stewardship of living marine resources through science-based conservation and management.

This year we celebrate the 40th Anniversary of the Endangered Species Act (ESA). The purpose of the ESA is to conserve threatened and endangered species and their ecosystems. Congress passed the ESA on December 28, 1973, recognizing that the natural heritage of the United States was of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." It was understood that, without protection, many of our Nation's living resources would become extinct. There are more than 2,140 species listed under the ESA. A species is considered endangered if it is in danger of extinction throughout all or a significant portion of its range. A species is considered threatened if it is likely to become endangered in the foreseeable future. The U.S. Fish and Wildlife Service (USFWS) within the Department of the Interior and NMFS share responsibility for implementing the ESA. NMFS is responsible for 93 marine species, from whales to sea turtles and salmon to Johnson's sea grass.

NMFS IMPLEMENTATION OF THE ESA

NMFS conserves and recovers marine resources by doing the following: listing species under the ESA and designating critical habitat (section 4); developing and implementing recovery plans for listed species (section 4); developing cooperative agreements with and providing grants to States for species conservation (section 6); consulting on any Federal agency actions where the agency determines that the action may affect a listed species or its designated critical habitat and to minimize the impacts of incidental take (section 7); partnering with other Nations to ensure that international trade does not threaten species (section 8); enforcing against violations of the ESA (sections 9 and 11); cooperating with non-Federal partners to develop conservation plans for the long-term conservation of species (section 10); and authorizing research to learn more about protected species (section 10).

How Species are Listed or Delisted

Any individual or organization may petition NMFS or USFWS to "list" a species under the ESA. If a petition is received, NMFS or USFWS must determine within 90 days if the petition presents enough information indicating that the listing of the species may be warranted. If the agency finds that the listing of the species may be warranted, it will begin a status review of the species. The agency must, within 1 year of receiving the petition, decide whether to propose the species for listing under the ESA. NMFS may, on its own accord, also initiate a status review to determine whether to list a species. In that instance, the statutory timeframes described above do not apply. The same process applies for delisting species.

NMFS or the USFWS, for their respective species, determine if a species should be listed as endangered or threatened because of any of the following five factors: (1) present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence. The ESA requires that listing and delisting decisions be based solely on the best scientific and commercial data available. The Act prohibits the consideration of economic impacts in making species listing decisions. The ESA also requires designation of critical habitat necessary for the conservation of the species; this decision does consider economic impacts.

The listing of a species as endangered makes it illegal to "take" (harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to do these things) that species. Similar prohibitions usually extend to threatened species. Federal agencies may be allowed limited take of species through interagency consultations with NMFS or USFWS. Non-Federal individuals, agencies, or organizations may have limited take through special permits with conservation plans. Effects to the listed species must be minimized and in some cases conservation efforts are required to offset the take. NMFS' Office of Law Enforcement works with the U.S. Coast Guard and other partners to enforce and prosecute ESA violations.

Interagency Consultation and Cooperation

All Federal agencies are directed, under section 7 of the ESA to utilize their authorities to carry out programs for the conservation of threatened and endangered species. Federal agencies must also consult with NMFS on activities that may affect a listed species or its designated critical habitat. These interagency consultations are designed to assist Federal agencies in fulfilling their duty to ensure Federal actions do not jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat. Biological opinions document NMFS' opinion as to whether the Federal action is likely to jeopardize the continued existence of listed species or adversely modify their designated critical habitat. Where appropriate, biological opinions provide an exemption for the "take" of listed species while specifying the extent of take allowed, the Reasonable and Prudent Measures necessary to minimize impacts from the Federal action, and the Terms and Conditions with which the action agency must comply. Should an action be determined to jeopardize a species or adversely modify critical habitat, NMFS will suggest Reasonable and Prudent Alternatives, which are alternative methods of project implementation that would avoid the likelihood of jeopardy to the species or adverse modification of critical habitat. Nationally, NMFS conducts approximately 1,200 ESA consultations per year.

SPECIES RECOVERY

Recovery of threatened and endangered species is a complex and challenging process, but one which also offers long-term benefits to the health of our environment and our communities. Actions to achieve a species' recovery may require restoring or preserving habitat, minimizing or offsetting effects of actions that harm species, enhancing population numbers, or a combination of all of these actions. Many of these actions also help to provide communities with healthier ecosystems, cleaner water, and greater opportunities for recreation, both now and in future generations.

Partnerships with a variety of stakeholders, including private citizens, Federal, State and local agencies, tribes, interested organizations, and industry, are critical to implementing recovery actions and achieving species recovery goals. Several NMFS programs, including the Species Recovery Grants to States and Tribes and the Pacific Coastal Salmon Recovery Fund, and the Prescott Marine Mammal Rescue Assistance Grant Program provide support to our partners to assist with achieving recovery goals. From 2000–2012 the Pacific Coastal Salmon Recovery Fund has provided $1.03 billion in funding to support partnerships in the recovery of listed

salmon and steelhead. From 2003–2013 the Species Recovery Grants to States has awarded $37 million to support State recovery and research projects for other listed species. From 2001–2013 the Prescott Program awarded over $44.8 million in funding through 483 grants to Stranding Network members to respond and care for stranded marine mammals.

ENDANGERED SPECIES ACT SUCCESSES

The ESA has been successful in preventing species extinction—less than 1 percent of the species listed have gone extinct. Despite the fact that species reductions occurred over often very long time periods, in its 40 year existence, the ESA has helped recover over 30 species. NMFS has recently delisted the Eastern population of Steller sea lion, our first delisting since 1994 when NMFS delisted the now thriving eastern population of Pacific gray whales. Between October 1, 2010, and September 30, 2012, of the 70 domestic endangered or threatened marine species listed under the ESA, 27 (39 percent) were stabilized or improving, 16 (23 percent) were known to be declining, 6 (8 percent) were mixed, with their status varying by population location, and 21 (30 percent) were unknown, because we lacked sufficient data to make a determination.

In addition to Pacific gray whales and Eastern Steller sea lions, ESA recovery actions have stabilized or improved the downward population trend of many marine species. For example, listed humpback populations are currently growing by 3–7 percent annually. In 2013, we saw record returns of nearly 820,000 adult fall Chinook salmon passing the Bonneville Dam on their way up the Columbia River to spawn. This is the most fall Chinook salmon to pass the dam in a single year since the dam was completed in 1938, and more than twice the 10-year average of approximately 390,000. A substantial number of Hawaiian monk seals are alive today because of direct interventions by the NMFS Recovery Program. Because of these efforts directed at monk seals, the population is 30 percent larger than if we had not acted, offering hope for future recovery and assurance our actions are making a difference. We face continuing challenges in recovering numerous other species. Declines in habitat in coastal areas from wetlands to coral reefs is often a major causative factor. As stresses on coastal ecosystems increase, it is important to place a priority on habitat protection and restoration in order to prevent listings and facilitate recovery and delisting.

PENDING LEGISLATIVE PROPOSALS

NMFS is currently analyzing the four legislative proposals that were recently introduced into the House of Representatives: H.R. 4315, the "21st Century Endangered Species Transparency Act," H.R. 4316, the "Endangered Species Recovery Transparency Act," H.R. 4317, the "State, Tribal, and Local Species Transparency and Recovery Act," and H.R. 4318, the "Endangered Species Litigation Reasonableness Act."

CONCLUSION

Extinctions are currently occurring at a rate that is unprecedented in human history. Each plant, animal, and their physical environment is part of a much more complex web of life. Because of this, the extinction of a single species can cause a series of negative events to occur that affect many other species. Endangered species also serve as "sentinel" species to indicate larger ecological problems that could affect the functioning of the ecosystem and likely humans as well. As importantly, species diversity is part of the natural legacy we leave for future generations. The wide variety of species on land and in our ocean has provided inspiration, beauty, solace, food, livelihood and economic benefit, medicines and other products for previous generations. The ESA is a mechanism to help guide conservation efforts, and to remind us that our children deserve the opportunity to enjoy the same natural world we experience.

Thank you again for the opportunity to discuss implementation of the Endangered Species Act. We would be happy to work cooperatively with the committee on these draft bills and would welcome the opportunity to discuss the legislation in more detail. I am available to answer any questions you may have.

The CHAIRMAN. Thank you very much, Mr. Rauch. And our last witnesses—for purposes of introduction, I will recognize my colleague from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman, and I would certainly like to welcome today a friend of mine from my home area in my district in Colorado, Tom Jankovsky. He is a County Commissioner in Garfield County in Colorado, a third-generation native Coloradan who is serving his first term as the Garfield County Commissioner.

Commissioner Jankovsky serves on the public lands lead for the Board of County Commissioners. During his tenure he has also served on the Garfield County Human Services Commission, the Garfield County Clean Energy Board, the county's Investment Advisory Board, and as a member of the Compressed Natural Gas Collaborative in Western Colorado.

The commissioner is currently working as a General Manager for Sunlight Mountain Resort in Glenwood Springs, Colorado. He has held that position at the ski area since 1985. And Tom was inducted into the Colorado Ski and Snowboard Hall of Fame in 2012. I am still trying to secure a picture of Tom on a snowboard. He is currently on the board, and is past Chair for Colorado Ski Country USA.

I certainly appreciate him, Mr. Chairman, taking the trip, and look forward to his testimony. And, with that, I yield back.

The CHAIRMAN. Mr. Jankovsky, you are recognized for 5 minutes.

STATEMENT OF THE HON. TOM JANKOVSKY, COMMISSIONER, GARFIELD COUNTY, COLORADO

Mr. JANKOVSKY. Thank you, Mr. Chairman and honorable members of the committee. I am here to speak in favor of H.R. 4315 and H.R. 4317 about the issues of transparency between local, State, and Federal Governments regarding the Endangered Species Act, as it relates to the potential listing of the greater sage-grouse.

The underpinning message to be conveyed is there is a serious lack of openness and fairness, transparency, in decisions being made by State and Federal agencies that are hidden behind the cloak of the ESA that have serious impacts on local communities. Information used by these agencies to make extraordinary decisions with enormous impacts on local communities, such is done with ESA, should be available for review and verification by those it impacts. To operate otherwise furthers the appearance—and perhaps the fact—that the information is inaccurate, misleading, has no scientific basis, and is agenda-driven by special interests. Therefore, by design, it is meant to be hidden from objective review. And, ironically, the ultimate casualty is the ESA and the species it is meant to protect.

At the local level, Garfield County has experienced this lack of transparency and freedom of information, as a cooperating agency with the BLM in the greater sage-grouse EIS. From the start, as a cooperating agency, we questioned the accuracy of habitat maps produced by the Colorado Department of Parks and Wildlife and used by the BLM in the development of the alternatives.

The greater sage-grouse habitat in Garfield County is unique. It is fragmented, located on ridgetops, with significant drops into valley floors. In our research and discussions with CPW it was discovered that the mapping was prepared at a 50,000-foot view, based on very coarse vegetation data, a subjective occupied range map,

and a 4-mile lek buffer that assumes large expanses of intact habitat. Ultimately, contrary to Federal requirements, the map is not reproducible, and is based on data that the agency used—refuses to release to the public, despite a Colorado open records request. As a result, we were left to create our own habitat maps at considerable expense. The map developed by Garfield County shows a 70 percent reduction in habitat.

I have questioned how the greater sage-grouse could ever be listed as an endangered or threatened species. The current estimated population numbers for the greater sage-grouse are reported to be between 350,000 and 535,000 birds, which is 70 to 107 times greater than the minimum effective population. At the reported current rate of decline of 1.4 percent per year, it would take 300 years for the population to dwindle to the minimum effective population.

In our view, there remains the fundamental breakdown in the types of information used to make decisions. For example, it has been reported that between 2001 and 2007, hunters bagged 207,000 birds. Additionally, 9,000 birds were harvested in Nevada alone in 2009 and 2010, which is just shy of the total number of birds currently estimated for the State of Colorado.

As a cooperating agency, we also question the science used in the EIS, which has adopted policies contained in the national technical team report. We question the science behind the 3 percent disturbance cap on development and habitat. This winter our own Governor Hickenlooper wrote to the U.S. Fish and Wildlife Service and Colorado's formal comments, "It is our understanding that there is limited scientific evidence that supports either of the two numbers currently in play for anthropogenic disturbance. Imposing an arbitrary cap on the landscape could have catastrophic impacts on resource use."

Garfield County requests for data use by State and Federal agencies concerning the greater sage-grouse EIS has been denied or not responded to. Through our biologist, Dr. Rob Ramey, we have requested population and population count data from the U.S. Fish and Wildlife Service to no avail. We would appreciate this committee's interceding on our behalf to obtain this data as soon as possible.

I support H.R. 4315 and H.R. 4317. Greater transparency and sharing of data will help local governments affected by ESA decisions that will have lasting social economic impacts on our communities.

Thank you for your time and assistance in this matter.

[The prepared statement of Mr. Jankovsky follows:]

PREPARED STATEMENT OF THE HON. TOM JANKOVSKY, COMMISSIONER, GARFIELD COUNTY, COLORADO ON H.R. 4315 AND H.R. 4317

Thank you Mr. Chairman and members of the committee.

My name is Tom Jankovsky, County Commissioner from Garfield County, Colorado.

I am here to speak in favor of H.R. 4315 and H.R. 4317 about the issue of transparency between local, State and Federal governments regarding the Endangered Species Act as it relates to the potential listing of the Greater Sage Grouse. The underpinning message to be conveyed is there is a serious lack of openness and fairness (transparency) in decisions being made by State and Federal agencies that are hidden behind the cloak of the ESA that have serious impacts on local communities.

Information used by these agencies to make extraordinary decisions with enormous impacts on local communities such as is done with the ESA should be available for review and verification by those it impacts. To operate otherwise, furthers the appearance and perhaps the fact that the information is inaccurate, misleading, and erroneous, has no scientific basis, and is agenda driven by special interests. Therefore by design is meant to remain hidden from objective review and ironically, the ultimate casualty is the ESA and the species it is meant to protect.

At the local level, Garfield County experienced this lack of transparency and freedom of information, as a Cooperating Agency with the Bureau of Land Management (BLM) in the Greater Sage Grouse Environmental Impact Statement (EIS). From the start, as a Cooperating Agency we questioned the accuracy of habitat maps produced by the Colorado Department of Parks and Wildlife (CPW) and used by BLM in the development of the alternatives in the Greater Sage Grouse EIS.

The Greater Sage Grouse habitat in Garfield County is unique, it is fragmented, located on ridge tops with significant drops into valley floors. In our research and discussions with CPW, it was discovered that the mapping was prepared at a 50,000 ft. view; based on very coarse vegetation data, a subjective occupied range map, and a 4-mile lek buffer that assumes large expanses of intact habitat. Ultimately, contrary to Federal requirements, the map is not reproducible and is based on data that the agency refuses to release to the public, despite a Colorado Open Records Act request and offers for data sharing agreement protections. As a result, we were left to create our own habitat maps at considerable expense. The map developed by Garfield County shows a 70 percent reduction in habitat.

A transparent review and validation of CPW data could have resulted in a habitat map that is effective for proper bird management in Garfield County's highly unique habitat; instead, we have two radically different habitat maps, where CPW's inaccurate map will produce lasting and extraordinary socio-economic impacts to our region.

I have questioned how the Greater Sage Grouse could ever be listed as an endangered or threatened species. The current estimated population numbers for the Greater Sage Grouse are reported to be between 350,000 and 535,000 birds which is 70 to 107 times greater than the "minimum effective population." At the reported current rate of decline of 1.4 percent per year (nationally assumed), it would take 300 years for the population to dwindle to the minimum effective population. How can the current status warrant inclusion on the endangered species list?

In our view, there remains a fundamental breakdown in the types of information used to make decisions. For example, it has been reported that between 2001–2007 hunters bagged 207,000 birds. Additionally, 9,000 birds were harvested in Nevada alone in 2009 and 2010 which is just shy of the total number of birds currently estimated for the entire State of Colorado.

As a Cooperating agency we also question the science used in the EIS, which has adopted policies contained in the National Technical Team (NTT) Report. We question the science behind the 3 percent disturbance cap on development in habitat. This winter, our own Governor Hickenlooper wrote to the U.S. Fish & Wildlife Service in the Colorado's formal comments, "It is our understanding that there is limited scientific evidence that supports either of the two numbers currently in play for anthropogenic disturbance (3 percent and 5 percent) . . . Imposing an arbitrary cap on the landscape could have catastrophic impacts on resource use."

In addition, in our County we question the science behind the 4-mile buffer from a lek (mating area of the Greater Sage Grouse). The 4-mile radius from a lek in Garfield County will start in sage brush habitat on the top of a ridge, go down a slope into an Aspen forest to the valley floor, go back up through a conifer forest, to the top of the next ridge and again start back down the next ridge. This shows the fragmentation of the habitat and why a 4-mile buffer does not work in our County.

Garfield County requests for data used by State and Federal agencies concerning the Greater Sage Grouse EIS, have been denied or not responded too. Through our biologist, Dr. Rob Ramey we have requested population and population count data from the U.S. Fish & Wildlife Service. We wish to verify this data as requested under the Information Quality Act. We would appreciate this committee's interceding on our behalf to obtain this data as soon as possible.

I support H.R. 4315 and H.R. 4317, greater transparency and sharing of data will help local governments, affected by ESA decisions that will have lasting socio-economic impacts on our communities.

Thank you for your time and assistance in this matter. We appreciate this opportunity and would be more than happy to answer any questions this committee may have.

Attachment 1: Topography Differences
Attachment 2: Suitable Habitat Mapping Differences
Attachment 3: Coordination Diagram
Attachment 4: BLM Instructional Memorandum 2012–044
Attachment 5: Key Differences That Make the Garfield County Greater Sage Grouse Plan a More Effective Conservation Tool Than Those Proposed by Federal Agencies

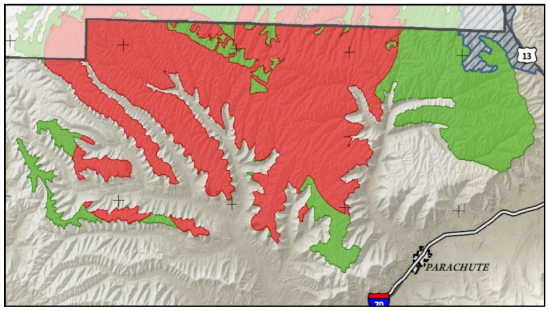
Attachment 1: Topography Differences

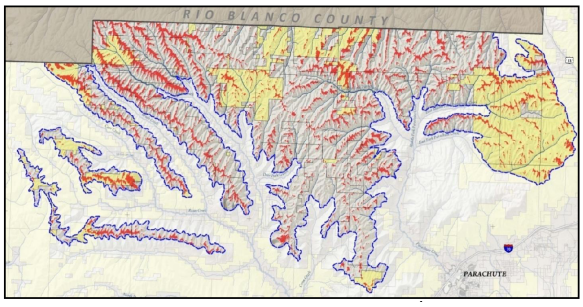
Pinedale, Wyoming Region & primary basis for science in NTT Report →

Typical topography and vegetation in Garfield County, CO in the Plan Area of the Greater Sage-Grouse Conservation Plan ←

Attachment 2: Suitable Habitat Mapping Differences

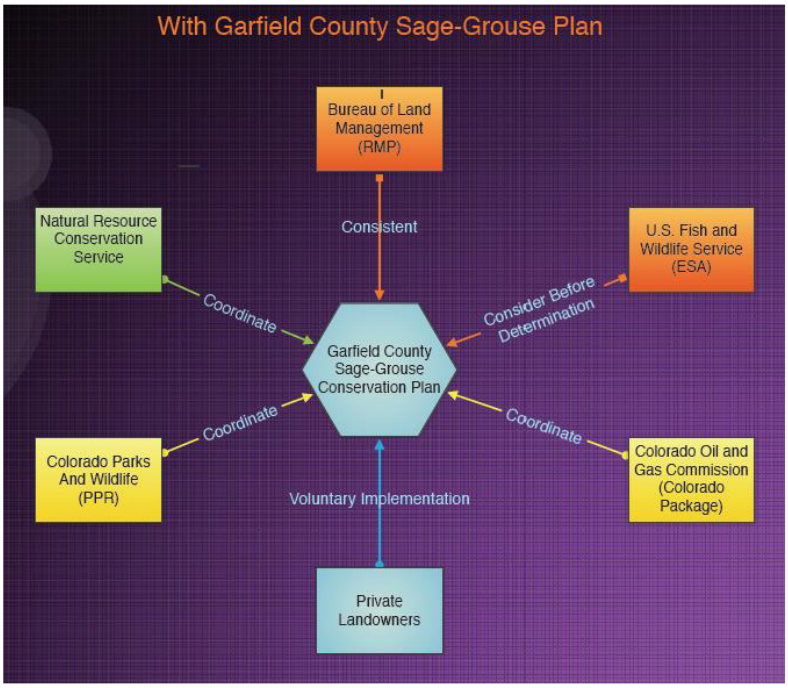
Colorado Parks & Wildlife Map: 220,000 acres of Greater Sage-Grouse Habitat (PPH & PGH) →





Garfield County Map: 28,000 acres of Greater Sage-Grouse Suitable Habitat ←

Attachment 3: Coordination Diagram



Attachment 4: BLM Instructional Memorandum 2012-044

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
http://www.blm.gov/
December 27, 2011

In Reply Refer To:
1110 (230/300) P
EMS TRANSMISSION 12/27/2011
Instruction Memorandum No. 2012-044
Expires: 09/30/2013

To: All Field Officials
From: Director
Subject: BLM National Greater Sage-Grouse Land Use Planning Strategy
Program Areas: All Programs.

Purpose: This Instruction Memorandum (IM) provides direction to the Bureau of Land Management (BLM) for considering Greater Sage-Grouse conservation measures identified in the Sage-Grouse National Technical Team's - *A Report on National Greater Sage-Grouse Conservation Measures* (Attachment 1) during the land use planning process that is now underway in accordance with the 2011 *National Greater Sage-Grouse Planning Strategy* (Attachment 2).

This IM supplements direction for Greater Sage-Grouse contained in WO IM No. 2010-071 (*Gunnison and Greater Sage-Grouse Management Guidelines for Energy Development*), the BLM's 2004 *National Sage-Grouse Habitat Conservation Strategy* and is a component of the 2011 *National Greater Sage-Grouse Planning Strategy* (Attachment 2). It is also consistent with WO IM No. 2011-138 (*Sage-Grouse Conservation Related to Wildland Fire and Fuels Management*).

In March 2010, the U.S. Fish and Wildlife Service (FWS) published its decision on the petition to list the Greater Sage-Grouse as "Warranted but Precluded." 75 Fed. Reg. 13910 (March 23, 2010). Over 50 percent of the Greater Sage-Grouse habitat is located on BLM-managed lands. In its "warranted but precluded" listing decision, FWS concluded that existing regulatory mechanisms, defined as 'specific direction regarding sage-grouse habitat, conservation, or management' in the BLM's Land Use Plans (LUPs), were inadequate to protect the species. The FWS is scheduled to make a new listing decision in Fiscal Year (FY) 2015.

The BLM has 68 land use planning units which contain Greater Sage-Grouse habitat. Based on the identified threats to the Greater Sage-Grouse and the FWS timeline for making a listing decision on this species, the BLM needs to incorporate explicit objectives and desired habitat conditions, management actions, and area-

wide use restrictions into LUPs by the end of FY 2014. The BLM's objective is to conserve sage-grouse and its habitat and potentially avoid an ESA listing.

In August 2011, the BLM convened the Sage-Grouse National Technical Team (NTT), which brought together resource specialists and scientists from the BLM, State Fish and Wildlife Agencies, the FWS, the Natural Resources Conservation Service (NRCS), and the U.S. Geological Survey (USGS). The NTT met in Denver, Colorado in August and September 2011, and in Phoenix, Arizona in December 2011, and developed a series of science-based conservation measures to be considered and analyzed through the land use planning process. This IM provides direction to the BLM on how to consider these conservation measures in the land use planning process.

In order to be effective in our ability to conserve Greater Sage-Grouse and their habitat, the BLM will continue to work with its partners including: the Western Association of Fish and Wildlife Agencies (WAFWA), FWS, USGS, NRCS, U.S. Forest Service (USFS), and Farm Services Agency (FSA) within the framework of the Sagebrush Memorandum of Understanding (2008) and the *Greater Sage-Grouse Comprehensive Conservation Strategy* (2006).

Policy/Action: The BLM must consider all applicable conservation measures when revising or amending its RMPs in Greater Sage Grouse habitat. The conservation measures developed by the NTT and contained in Attachment 1 must be considered and analyzed, as appropriate, through the land use planning process by all BLM State and Field Offices that contain occupied Greater Sage-Grouse habitat. <u>While these conservation measures are range-wide in scale, it is expected that at the regional and sub-regional planning scales there may be some adjustments of these conservation measures in order to address local ecological site variability</u>. Regardless, these conservation measures must be subjected to a hard look analysis as part of the planning and NEPA processes.

This means that a reasonable range of conservation measures must be considered in the land use planning alternatives. As appropriate, the conservation measures must be considered and incorporated into at least one alternative in the land use planning process. Records of Decision (ROD) are expected to be completed for all such plans by the end of FY 2014. This is necessary to ensure the BLM has adequate regulatory mechanisms in its land use plans for consideration by FWS as part of its anticipated 2015 listing decision.

When considering the conservation measures in Attachment 1 through the land use planning process, BLM offices should ensure that implementation of any of the measures is consistent with applicable statute and regulation. Where inconsistencies arise, BLM offices should consider the conservation measure(s) to the fullest extent consistent with such statute and regulation.
The NTT-developed conservation measures were derived from goals and objectives developed by the NTT and included in Attachment 1. These goals and objectives are a guiding philosophy that should inform the goals and objectives developed for individual land use plans. However, it is anticipated that individual plans may

develop goals and objectives that differ and are specific to individual planning areas.

Through the land use planning process, the BLM will refine Preliminary Priority Habitat and Preliminary General Habitat data (defined below) to: (1) identify Priority Habitat and analyze actions within Priority Habitat Areas to conserve Greater Sage-Grouse habitat functionality, or where possible, improve habitat functionality, and (2) identify General Habitat Areas and analyze actions within General Habitat Areas that provide for major life history function (e.g., breeding, migration, or winter survival) in order to maintain genetic diversity needed for sustainable Greater Sage-Grouse populations. Any adjustments to the NTT recommended conservation measures at the local level are still expected to meet the criteria for Priority and General Habitat Areas.

Preliminary Priority Habitat (PPH): Areas that have been identified as having the highest conservation value to maintaining sustainable Greater Sage-Grouse populations. These areas would include breeding, late brood-rearing, and winter concentration areas. These areas have been/are being identified by the BLM in coordination with respective state wildlife agencies.

Preliminary General Habitat (PGH): Areas of occupied seasonal or year-round habitat outside of priority habitat. These areas have been/are being identified by the BLM in coordination with respective state wildlife agencies.

PPH and PGH data and maps have been/are being developed by the BLM through a collaborative effort between the BLM and the respective state wildlife agency, and are stored at the National Operations Center (NOC). These science-based maps were developed using the best available data and may change as new information becomes available. Such changes would be science-based and coordinated with the state wildlife agencies so that the resulting delimitation of PPH and PGH provides for sustainable populations. In those instances where the BLM State Offices have not completed this delineation, the Breeding Bird Density maps developed by Doherty 2010[1] As LUPs are amended or revised, the BLM State Offices will be responsible for coordinating with the NOC to use the newest delineation of PPH and PGH. To access the PPH and PGH data, please use the following link: \\blm\dfs\loc\EGIS\OC\Wildlife\Transfers\GREATER_SAGE_GROUSE_GIS_DATA.
will be used. The NOC will establish the process for updating files to include the latest PPH and PGH delineations for each state. This information will assist in applying the conservation measures identified in Attachment 1 below.

Timeframe: This IM is effective immediately and will remain in effect until LUPs are revised or amended by the end of FY 2014.

Budget Impact: This IM will result in additional costs for coordination, NEPA review, planning, implementation, and monitoring.

Background: Following a full status review in 2005, the FWS determined that the Greater Sage Grouse was "not warranted" for protection. Decision documents in

support of that determination noted the need to continue and/or expand all efforts to conserve sage-grouse and their habitats. As a result of litigation challenging the 2005 determination, the FWS revisited the determination and concluded in March 2010 that the listing of the Greater Sage-Grouse is warranted but precluded by higher priority listing actions.

In November 2004, the BLM published the *National Sage-Grouse Habitat Conservation Strategy*. The BLM National Strategy emphasizes partnerships in conserving Greater Sage-Grouse habitat through consultation, cooperation, and communication with WAFWA, FWS, NRCS, USFS, USGS, state fish and wildlife agencies, local sage-grouse working groups, and various other public and private partners. In addition, the *Strategy* set goals and objectives, assembled guidance and resource materials, and provided comprehensive management direction for the BLM's contributions to the ongoing multi-state sage-grouse conservation effort.

In July 2011, the BLM announced its *National Greater Sage-Grouse Planning Strategy* (Attachment 2). The goal of the *Strategy* and this IM is to review existing regulatory mechanisms and to implement new or revised regulatory mechanisms through the land use planning process to conserve and restore the Greater Sage-Grouse and their habitat. The Gunnison Sage-Grouse, bi-state population in California and Nevada and the Washington State distinct population segments of the Greater Sage-Grouse will be addressed through other policies and planning efforts.

Manual/Handbook Sections Affected: None.

Coordination: This IM was coordinated with the office of National Landscape Conservation System and Community Partnership (WO-170), Assistant Director, Renewable Resources and Planning, (WO-200), Minerals and Realty Management (WO-300), Fire and Aviation (WO-400), BLM State Offices, FWS and state fish and wildlife agencies.

Contact: State Directors may direct questions or concerns to Edwin Roberson, Assistant Director, Renewable Resources and Planning (WO-200) at 202-208-4896 or edwin_roberson@blm.gov; and Michael D. Nedd, Assistant Director, Minerals and Realty Management (WO-300) at 202-208-4201 or mike_nedd@blm.gov.

Signed by: Authenticated by:
Mike Pool Ambyr Fowler
Acting, Director Division of IRM Governance, WO-560

Attachment 5: Key differences that make the Garfield County Greater Sage Grouse Plan a more effective conservation tool than those proposed by federal agencies.

High-resolution habitat mapping

The habitat mapping provided by State and Federal agencies in 2012 for Greater Sage-Grouse in the Plan Area was at a landscape level that did not accurately address the unique topography of the Roan Plateau, or provide planning information at resolution accurate enough for County to use in the Plan, and for relevant land-use planning activities potentially occurring within the Plan area, including protection of sage grouse habitat. Because of the significant implications on land use and ongoing land management, the Board of County Commissioners deemed that most accurate delineation of habitat was deemed necessary. This habitat mapping process followed the latest and most relevant peer-reviewed habitat mapping process available for mapping large and diverse areas, using the highest resolution data available (with a two-meter resolution, as compared to the one kilometer, landscape-level resolution used by the agencies).

The sage-grouse habitat in Garfield County is naturally fragmented, as a result of topography and the patchy nature of sagebrush, non-sagebrush shrubs, meadows, aspen, and conifers in the Plan area. Expanses of contiguous sagebrush, necessary to support a large stable population (as described by the Fish and Wildlife Service in their 2010 candidate determination notice), do not exist in Garfield County. Additionally, the sage-grouse population inhabiting Garfield County is a peripheral population located on the far southeastern edge of the species range. As a result, the stewardship of the population requires detailed knowledge of local conditions, including accurate mapping of its habitat.

Conservation measures are tailored to local circumstances

Rather than rely on one-size-fits-all regulatory prescriptions, such as four mile buffers and three percent anthropogenic disturbance thresholds proposed by the BLM's National Technical Team (NTT), the County has taken a more effective approach: tailoring conservation measures to address specific threats to sage grouse and local circumstances that are unique to Garfield County (i.e. predation and a naturally fragmented habitat). The significance of this strategy to sage grouse conservation is that it allows for a more efficient allocation of conservation effort by focusing on threats that matter most in *this* sage grouse population.

Voluntary conservation efforts on private land

In contrast to the NTT report, where the proposed conservation measures assume that private land management is inferior to federal land management, and requires a regulatory "command and control" approach, the Garfield County Plan recognizes and builds upon the importance of voluntary conservation by private landowners. The importance of voluntary conservation on private land is recognized by many scholars of the Endangered Species Act, including the current Deputy Assistant

Secretary of Fish and Wildlife and Parks, Michael Bean, who has authored multiple papers on the subject.

Annual Review and adaptive management

Recognizing that local governments can be more nimble than federal agencies, the Garfield County Plan includes a required annual coordination review with the federal and state agencies that have habitat or species responsibilities within the Plan Area. (A review may also be initiated based on important new information.) This review process will evaluate the availability and condition of habitats, direct and indirect impacts, conservation measures, policies and best management practices being implemented by each agency for their effectiveness and applicability to the Plan Area. Also incorporated in this coordination review is any new scientific information and, if warranted, modifications to the best management practices, policies, and conservation incentives within the Plan. The County will also initiate meetings with private property owners in the Plan Area for the purpose of analyzing their conservation efforts and effectiveness, as well as any new scientific data. The annual coordination review will ensure that Plan updates are timely, adaptive, and based on the best available scientific and commercial data.

Consistency with the Information Quality Act

The Garfield County Plan ensures that sage-grouse habitat management decisions shall be made based on the best available scientific information that is applicable to sage-grouse habitat in Garfield County. The scientific information used will be consistent with standards of the Information Quality Act (Quality, Objectivity, Utility and Integrity), as determined by the County. In contrast to the interpretation of the Act by some federal agencies, this means that the data collected by state and federal agencies, or used in published scientific research relied upon by those agencies, must be provided to the County.

The Garfield County Plan acknowledges that many of the purported "universal" negative impacts of fluid mineral development, an important economic activity on the Roan Plateau and Piceance Basin, are based upon outdated information and/or overstated. In fact, none of the studies cited in the NTT report can definitively point to an actual population decline rather than temporary displacement of sage grouse from areas immediately affected by current fluid mineral development. Instead, the extraction of fluid minerals in Garfield County (and increasingly elsewhere) is accomplished using increasingly advanced technologies, more efficient operations, avoidance of important habitat, more effective mitigation measures, and interim habitat restoration, than in the past. As a result, surface disturbances that potentially affect sage grouse tend to be minimal and temporary in nature. The fast pace of these technological developments and more efficient operations has meant that the primary literature on the impacts of fluid mineral extraction on sage grouse in Wyoming is inconsistent with current practices used in Garfield County. It is anticipated that the more advanced technologies under development will continue to allow the efficient extraction of resources while further avoiding or minimizing impacts to sage grouse and other species.

A balance of harms approach ensures responsible stewardship of natural and human resources in Garfield County

In contrast to the approach proposed in the NTT report, that focuses solely on the welfare of sage grouse, the Garfield County Plan requires that the balance of impacts to other species and to human welfare must be weighed prior to approval and implementation.

The CHAIRMAN. Thank you very much, Commissioner Jankovsky, and I want to thank the panel for your statement. I will now recognize myself for 5 minutes for questioning.

The common thread in all of these four bills, particularly two of them, is transparency so that people know why decisions are being made. And, frankly, on a larger scale, unless you have transparency in the form of government that we have, we don't have a government of the people. I mean that is just common sense, to me.

So, with that in mind—and I suppose that cuts both ways—but, Mr. Bean, let me ask you a question, or for a comment. When I introduced H.R. 4315 several weeks ago, the Center for Biological Diversity characterized it as a weakening of the Endangered Species Act. Now, I found that a bit puzzling. And the reason I found that puzzling, because on December 19 the Center for Biological Diversity, along with the Natural Resources Defense Council and the Sierra Club sent a letter to you when you were looking at removing the grizzly bear from the list. And this is what they said in their letter, toward the end of the letter: "Yellowstone grizzly bear data have been collected nearly exclusively under the authority of the Federal Government and funded by taxpayers. Release of this data will promote efficiency and effectiveness in government. Simply put, release of this data is consistent with the principles of good governance, transparency, and good science." Now, that is from the Center of Biological Diversity, which was part of the mega-settlement that was done behind closed doors that has affected a lot of people, potentially, throughout the country.

Two questions. Have you responded to that letter, do you know?

Mr. BEAN. Not to my knowledge.

The CHAIRMAN. You have not responded to that. Yes, you have not responded to that letter.

Mr. BEAN. Not to my knowledge.

The CHAIRMAN. OK. If you have, would you provide to the committee your response to that letter?

Mr. BEAN. Yes, of course.

The CHAIRMAN. OK. And the last part—and I understand that you did not say transparency was not a good idea, but you had some conditions of that transparency. So, I just wonder if this is, I guess, part of examples where transparency is good.

Mr. BEAN. What I believe I said was that the Fish and Wildlife Service is committed to transparency in its decisionmaking, and its regular processes are ones that disclose the data upon which it relies, as well as the Service does make available the data that it has in its possession or control.

I tried to make the point that often what the Fish and Wildlife Service utilizes are published studies, reports, analyses, and so forth, and those published reports, analyses, and studies are often based on State data that the Fish and Wildlife Service neither has nor has the right to give to others.

But, to the extent the Service has that data in its own possession, unless there is some compelling reason under FOIA to withhold it—I would give us one example. Sometimes the Fish and Wildlife Service gets from the Defense Department certain high-resolution photographs about species locations, and the Defense Department asks that that data not be released to the public for security-related purposes. Unless there is a reason like that, the Service, as a general matter and a routine matter, makes available the data that it has.

The CHAIRMAN. But the principle of the data being made on listings is good policy.

Mr. BEAN. Yes.

The CHAIRMAN. Yes. OK. Dr. Ramey, would you—in your ending oral remarks you kind of alluded to potentially this sort of contingency, I guess, with some of the groups that are involved. Would you care to comment on that?

Dr. RAMEY. Information is power. Data is power. And if data are withheld, then the group or the agency that hold that data can maintain their power. And it has been my experience in trying to obtain data from individuals, researchers that are permitted by the Federal agencies—and it is not really very much State data, Michael, it tends to be more independent researchers—it can be like pulling teeth to try and obtain that data. You write a polite letter, you get a refusal, the questions come back, "What are you going to do with this?"

"Well, I would like to actually look at your study." It is not just me; other colleagues of mine have had the same issue, over and over again. There are times that you can submit a FOIA to obtain data. But, ultimately, some data sets have been obtained under subpoena, like the Coastal California gnatcatcher data. And then—it shouldn't come to that.

Here, we are facing a situation with a listing of greater sage-grouse, where some of the data is maintained by States, but that data set is now 7 years old. There have been numerous papers published on this. The data set is shared among a good old boys club of people, and yet the data is not public, and we are about to spend billions, if not trillions, of dollars on this listing.

The CHAIRMAN. All right. My time is expired, but I just wanted to make the point it comes both ways. This letter that I referenced was for de-listing. Should not the same principle apply for listing? That is what the issue is.

With that, I will recognize the distinguished Ranking Member, Mr. Grijalva.

Mr. GRIJALVA. Thank you very much, Mr. Chairman. Mr. Bean, let me just get an answer and you can amplify that answer. Is it true that the only way to get data from Fish and Wildlife that you use in listing the decision is through a FOIA request?

Mr. BEAN. No, I don't believe that is true. I think the Fish and Wildlife Service commonly makes available data that it has by publishing the reports and studies, or certainly a list of reports and studies on which it relies with the proposed and final listing decisions. That data is published on the regulations.gov Web site for anybody to access who cares to see it.

Mr. GRIJALVA. And I appreciate that, because that is the question that we are going to hear over and over again today.

Dr. Courtney, do you think there is any sound scientific basis for pre-determining that certain sources of data are always going to be the best scientific and commercial data available?

Dr. COURTNEY. Congressman, science is a process. And so it is an ongoing process, and it is always a work in progress. And there is no reason to assume that your science is better than mine, just because you are sitting up there and I am down here.

The processes of science are self-correcting, and we figure things out, and ultimately the truth is out.

Mr. GRIJALVA. Dr. Courtney, you noted that the peer review you led regarding the Fish and Wildlife's proposal to de-list the gray wolf unanimously found that the proposal was not based on the best scientific and commercial information available, and that is an indication of a situation where, as you mentioned, it is an ongoing process, so corrective action is warranted. In your opinion, is that corrective action in this case of withdrawal of de-listing—is the withdrawal of that de-listing decision——

Dr. COURTNEY. I have no opinion on what the Service should do, Congressman. My task was very simple, which was to guide a process to look at what the science said and a panel unanimously found that the science in that case did not support one part of the agency's proposed de-listing. We didn't consider all aspects of the proposal. And, of course, the use of science is a totally different thing from creating science.

Mr. GRIJALVA. Appreciate that. Commissioner Jankovsky, in your testimony you say that with respect to the greater sage-grouse EIS that was developed by the Bureau of Land Management, that, "From the start we questioned the accuracy of habitat maps produced by the Colorado Department of Parks and Wildlife," and that the maps produced by your county were much different. Let me try to understand this. So are you saying there was a conflict, fundamental conflict, between the data in the maps that the State and county were providing the Bureau of Land Management?

Mr. JANKOVSKY. I was saying that the maps provided by the State of Colorado to the Bureau of Land Management that were used in the greater sage-grouse EIS for northwest Colorado were considerably different from our maps. Garfield County, Colorado, is very unique in its habitat. It is fragmented——

Mr. GRIJALVA. OK.

Mr. JANKOVSKY [continuing]. And we found a 70 percent reduction in the amount of habitat in Garfield County.

Dr. RAMEY. Could I jump in?

Mr. GRIJALVA. So they were different.

Dr. RAMEY. That mapping was done at a 2-meter resolution——

Mr. GRIJALVA. Excuse me, I have a question over here, thank you. I really don't have any questions for you, so I want to concentrate here.

What would happen, Commissioner, again, if Fish and Wildlife were required to consider the county data and the State data to be the best information available? How would—if you have them in conflict?

Mr. JANKOVSKY. They are in conflict. And we did use 2-meter resolution, where the State used a much broader—actually, State Fish and Wildlife people stated that it was a 50,000-foot view——

Mr. GRIJALVA. So——

Mr. JANKOVSKY [continuing]. They used on the mapping, where we went down——

Mr. GRIJALVA. With regard to the legislation, then, the county data, which you feel—you support, is, in your estimate, the best available data, and not the State's.

Mr. JANKOVSKY. That is correct. And we feel——

Mr. GRIJALVA. So that would hold precedent in any decision.

Mr. JANKOVSKY. I don't know if it would hold precedent in any decision——

Mr. GRIJALVA. That is fine.

Mr. JANKOVSKY [continuing]. But we feel that we have the best available——

Mr. GRIJALVA. OK, thank you.

Mr. JANKOVSKY [continuing]. Data, and the best science——

Mr. GRIJALVA. Yield back.

The CHAIRMAN. I thank the gentleman. I will recognize the gentleman from Colorado, Mr. Tipton.

Mr. TIPTON. Thank you, Mr. Chairman. And, Mr. Ramey, I would like to be able to hear your answer. If you can keep it brief, we have a limited amount of time. We are talking about best available science. What was the discrepancy between the State of Colorado and the map produced by Garfield County?

Dr. RAMEY. It is a question of the resolution of the data. Much higher resolution in the vegetation mapping provided—done by the county and their GIS group, as opposed to that being proposed by the Federal agencies. The same situation has been found in the Gunnison sage-grouse, as well, where large parts of non-habitat, including the Town of Doat Creek and Gunnison Gorge, were declared as critical habitat.

And so, if one has the chance to obtain the data and do a superior analysis, it benefits species protection, because you can put the——

Mr. TIPTON. So it goes to the Commissioner's statement it was a 50,000-foot view, you narrowed this down to actually look at something that—you noted in your testimony you need a certain amount of ground cover, you need a certain amount of water to be available if you really want to be able to recover the species. The broad brush stroke simply doesn't work. Is that accurate?

Dr. RAMEY. That is very accurate. There is a lot of collateral damage, in terms of public support, when critical habitats are overextended.

Mr. TIPTON. Great. Commissioner, let's talk about real acres. I think in the West it is so expansive. You said a 70 percent reduction. How many acres did they want to include in Garfield County, and what did you reduce it to with good science?

Mr. JANKOVSKY. Garfield County has 220,000 acres of priority habitat, and with good science that was reduced to about 70,000 acres.

Mr. TIPTON. About 70,000 acres, a huge reduction in that.

You know, Mr. Bean, I would like to be able to find out—you talked about transparency, and wanting to be able to open the door on that. And why are we not releasing the NTT Report?

Mr. BEAN. The NTT Report was published a couple years ago. It has been released.

Mr. TIPTON. We don't have the information. Have you received the information, Mr. Ramey?

Dr. RAMEY. I think you are mistaken on that. I think that what you might be referring to is the sage-grouse lek count data that are the basis, the fundamental basis, of the 2010 listing decision on the greater sage-grouse. And that data was analyzed under this

Federal cooperative agreement from the Fish and Wildlife Service, and yet 6 years later the data are still not public.

Mr. TIPTON. Why is that not public, Mr. Bean?

Mr. BEAN. The data—well, first of all, the study is a study by Dr. Garten and others that—the authors of the study are employed by the Idaho Department of Fish and Game, the Oregon Department of Fish and Wildlife, and the Washington Department of Fish and Wildlife, and the University of Idaho. The data they used to compile their report is State-maintained data. That data has never been made available to the Fish and——

Mr. TIPTON. Are you making decisions off that data?

Mr. BEAN. We are not making decisions off of that——

Mr. TIPTON. Are you using that data?

Mr. BEAN. We will be using the report and other information to make a decision——

Mr. TIPTON. Don't you think that ought to be public, if we are talking about transparency?

Mr. BEAN. I think that if the States decide to release that data, it would be a good thing.

Mr. TIPTON. You are an advisor to Fish and Wildlife and the Department of the Interior. Are you giving them advice, "We need to be able to have transparency so we can make good, sound judgments"?

Mr. BEAN. I have advocated in my testimony and elsewhere, transparency. I have also made clear that we cannot withhold what we do not have. And, in this instance, the information involved is maintained and controlled by the States.

Mr. TIPTON. Let's talk a little bit about population count. Commissioner, have you been given a goal to be able to reach, how many birds? And we have achieved a recovery?

Mr. JANKOVSKY. No, I think that is one of the difficulties that Dr. Ramey was talking about, is that even in our small area, there is no set population. It is an estimate, and we actually have a biologist from CPW working there, but we don't have a number that is specific to our area.

Mr. TIPTON. Mr. Bean, how do we get recovery if we don't know what the numbers are?

Mr. BEAN. Numbers are a part of the equation. The main focus is threats, identifying and addressing threats. The Fish and Wildlife Service is required by Congress's law, the Endangered Species Act, to consider five factors in deciding whether or not a species is to be listed.

Mr. TIPTON. You know, the Commissioner just gave us some pretty big numbers, in terms of the population of the bird. How do we know, when we have an 11-State recovery program, if we have had success in Colorado—it is still going to be listed if it is not achieved by some ambiguous number that you won't give us in Wyoming—that we have achieved recovery? How do we actually win, given what you are actually laying out, without transparency?

Mr. BEAN. Well, what the Fish and Wildlife Service is doing at present is working closely with Colorado and the other 10 States that have——

Mr. TIPTON. Our Governor pointed out that we have the best science on the ground in the State of Colorado, and are achieving recovery——

Mr. BEAN. I am aware of the Governor's letter. With respect to the matter that Mr. Jankovsky raised, the Bureau of Land Management's EIS is a draft EIS. They have made no final decision. They have made no final EIS. They are in the process of incorporating data from the county and others in a revised EIS. It is a testament to the strength of the process that the information available to the Bureau can improve through the input from the counties and others. And, as the Bureau makes a decision on its land use plan, it will have the benefit of the counties' input, and will have the ability to make a well-informed decision.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from California, Mr. Huffman.

Mr. HUFFMAN. Mr. Chair, thanks very much. I appreciate that the stated concern, stated purpose of this hearing and this legislation we are talking about today is over species recovery and de-listing. On at least that much I think both parties can agree. We want to see species recover, we want to see them de-listed.

That is about where it ends, though, because the premise of the bills we are considering and a lot of the debate is that the problem is that we are not recovering more species because we are somehow listing too many, or that we are somehow spending too much time on lawsuits that seek listing. And I find that a bit too far. We are not going to help the Endangered Species Act with the conservation and de-listing of species by making it harder to list them, or by making it harder to enforce the Act.

But it does appear to me that there is something we can do to help species recovery and de-listing, and that is to actually invest in species recovery and de-listing. So I have a question for our witnesses from NMFS and the Fish and Wildlife Service. I would like to ask you how much you have requested for your various efforts to recover species in the last fiscal year, and then tell us how much was appropriated in response to those requests.

Mr. RAUCH. Thank you for the question. I don't have those exact numbers. We will get them to you from the National Marine Fisheries Service.

Mr. HUFFMAN. All right. Is it fair to say that your requests have not been matched in the appropriations, that there is a shortfall?

Mr. RAUCH. I do not know the specific numbers. I know that since 2010 Congress has not appropriated the full amount we have requested for at least Pacific salmon. There has been a shortfall there, where the President has requested more than we have received. In 2014 we received some of those numbers back, so I don't know if that trend continues.

Mr. HUFFMAN. All right. Mr. Bean, can I ask you? I know you have requested millions in cooperative recovery and de-listing efforts. Tell us about how the appropriations have matched that.

Mr. BEAN. I only know part of the answer to your question, which is for the FY 2015 budget request the Service has requested an $18 million increase for recovery-related purposes.

Mr. HUFFMAN. How many species are currently listed as warranted but precluded because your agencies lack resources to implement adequate protections? Do either of you know, off the——

Mr. RAUCH. I do not believe that NMFS has any listed as warranted but precluded.

Mr. BEAN. I don't know the precise number. My guess is it is in the ballpark of 150 or so for the Fish and Wildlife Service. That may give or take 20.

Mr. HUFFMAN. My information is that you have 145 candidate species, according to the Fish and Wildlife Service Web site, 51 species currently proposed for listing, according to your Web site. Can either of you identify any currently protected or listed species whose recovery you think would benefit from the passage of any of these four bills?

Mr. BEAN. I cannot. I think the concern that I expressed was that these bills, although they are directed at the purpose that we share of improving transparency and improving reliance upon good science, I do not see how these bills will increase the resources, or increase the effectiveness of the tools we now have to recover species.

If I can say a word just about recovering species, so far in this administration some 11 species have been recovered and de-listed due to recovery, which is more than in any prior administration. There are, indeed, nine others proposed for de-listing because of recovery. So we are making good progress in recovering and de-listing species, but there are a lot of species that are still a long ways from recovery that are clearly doing very well, compared to their historical numbers. And among them, California condors, black-footed ferrets, Florida manatees, and whooping cranes, all of which are at or near their historic highs over the last half-century or more, all of which will remain endangered species for many more years, because they were reduced to very low numbers, but all of which are clearly major successes for the Endangered Species Act, even though they are still endangered species not yet recovered.

Mr. HUFFMAN. All right. Mr. Rauch?

Mr. RAUCH. I concur with Mr. Bean's statements regarding the effects of these bills on recovery. I do not see a direct link between these bills and efforts to recover the species. And I would also echo his comments about the success on recovery that this administration has had. There are large efforts that have been made, and I think we can all be proud of those.

Mr. HUFFMAN. All right, thank you.

The CHAIRMAN. The time of the gentleman has expired. I recognize the gentleman from Texas, Mr. Flores.

Mr. FLORES. Thank you, Mr. Chairman. Senator Seliger, let's start with you for a minute. Can you cite any examples of how better cooperation or better, actually, data communication regarding ESA matters would have better facilitated the Federal Government implementing ESA, and resulted in a better outcome for Texas?

Mr. SELIGER. I think I can, Congressman Flores, in that the process we believe, should be data-driven.

Mr. FLORES. Right.

Mr. SELIGER. There clearly is an empirical measure of species population to determine whether they are increasing or declining. And then, where the science comes in is to analyze the problems, the threats, and the possible solutions. And then, very importantly, to measure the progress made to consider de-listing.

And I find it interesting, reflecting on Congressman Huffman's questions just last week, Director Ashe suggested a $9 million decrease in grants to States to be used in the scientific inquiry around endangered species. It is a big help to States.

Mr. FLORES. Thank you, Senator Seliger. Commissioner Jankovsky, how has your interaction with the Bureau of Land Management and Fish and Wildlife Service on the sage-grouse impacted your county, and what have your county's own efforts produced in the way of sage-grouse needs and management? I think you drilled into that a little bit——

Mr. JANKOVSKY. OK. We are definitely at the local level. I mean, you know, we are the ones that make local land use decisions that affect the bird, at least in our county, and we have coordinated with the Bureau of Land Management, and they have come to meetings, and we have talked about issues, and we have had direct, face-to-face discussions. We have sent letters to—at least to Denver, to Fish and Wildlife Service, and those letters have not even been responded to.

And we do have questions about the science, especially in our county. And we look at it at the local level, and we have control at the local level, and that is what is missing, in my opinion.

Mr. FLORES. OK, thank you. Dr. Ramey, Mr. Courtney has suggested that data transparency could threaten conservation planning, and he cited as an example the lesser prairie chicken, which, despite extensive State, local, and private efforts to keep it off the list, was listed by FWS 2 weeks ago.

A report by the Center for Environmental Science, Accuracy, and Reliability concluded that the FWS listing rule for the prairie chicken failed to consider data and analysis demonstrated in the lesser prairie chicken populations were increasing, and that genetic isolation has not occurred. So, in this regard I have two questions.

First of all, do you agree with Mr. Courtney, that data transparency could threaten conservation planning?

Dr. RAMEY. Briefly, just a correction. That report, I believe, refers to the greater sage-grouse and the genetic diversity in that——

Mr. FLORES. I am sorry——

Dr. RAMEY [continuing]. Numbers.

Mr. FLORES. That is right.

Dr. RAMEY. Yes. In my direct experience, having worked on endangered species in the field, including California condors and peregrine falcons, peninsular bighorn sheep, Sierra bighorn sheep, and on and on, openness and transparency and having the data allows you to have a re-examination of the threats to the species, and you can have a discussion and debate about those and prioritize. If data are withheld, there is no opportunity for that.

You can have all the studies you want, you can have all the peer reviews you want. But unless the peer reviewers and the public have access to the data, there is no way that this is truly an effective scientific decision. And the statute requires that these deci-

sions be based on data, not opinions, not speculation in papers. The Office of Management and Budget, with the Data Quality Act, require that these be based on data.

Mr. FLORES. Well, that brings us to my next question, and that is, you know, this data discrepancy that is described in this report, is that another example of how important State and local data is for the Federal Government to use before the ESA listing?

Dr. RAMEY. Well, State and local data are essential to having an effective recovery, because local data, local knowledge, certainly like in Garfield County, is essential. You can't have one-size-fits-all solutions to endangered species. It has to be tailored to the problems, and you need to prioritize your effort on addressing the threats.

Mr. FLORES. Mr. Courtney, I have a question for you, but, given my time, you will have to answer following this report. Maybe you can do that in writing for us.

I have some conflicts among the answers that you gave. First of all, in your testimony you said that you recommend making use of existing technologies. But in your answers you said sciences work in progress and science is self-correcting. So I think there is a conflict between using things that are existing, but still trying to always use the best-available science. So if you would submit an answer following this hearing, I would appreciate it.

Dr. COURTNEY. Of course.

Mr. FLORES. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from California, Mr. Costa.

Mr. COSTA. Thank you very much, Mr. Chairman. To the scientists that are here, and some of the other folks that are dealing with these issues on an ongoing basis, I kind of have a statement that I want to make, because I think the notion of trying to create further transparency is meritorious, I think, when we are dealing with the challenges facing the Endangered Species Act. I think many of us who feel that there ought to be changes or modifications to reflect the reality of the challenges we face today in species recovery often times get drowned out.

When we talk about best science available, we know that the—to take a follow-up on the comment from the gentleman who just spoke, Mr. Flores—the science is changing, so we learn more. And so, the best science available is never a stationary place. And I think that, you know, we can look to all the experts, and we do—National Academy of Sciences and others—who opine and write opinions on changing developments. But our credibility is always lacking when we have difficulty in species recovery.

And, of course, with changes in climate, we have a lot of noted biologists, scientists, and others that say that it may be literally an impossible feat to accomplish to recovery species in which water temperatures are changing over a period of time, and other factors. And we don't take that into account.

So, I guess, in terms of our credibility, how do we define success? How do we define success in species recovery? And often times, I mean, you talk about the California condor, we talk about salmonid recovery. I mean there is a whole host of issues that I am familiar

with on the West Coast. The fact is that, often times, there are multiple factors that cause the decline in these species.

And so, when we deal with—most of the time, from a regulatory standpoint, we don't have the ability to deal with multiple factors, and it is like trying to fly an airplane when you have only one control, and that is over power, and you don't have control over the airlines or other elements that would factor in.

So, who wants to try to take this on, when we talk about changes that are necessary in the law?

Dr. RAMEY. I will be glad to jump in. And, as you know, the delta smelt is a case where, because the data are public and available, there have been, over the last 2 years, 3 years, six papers, including a paper by scientists at NCEAS, to re-examine all the data set and look at it in new ways, in trying to figure out what are the current problems for the delta smelt. Not the past problems, but the current problems. And one of those they identified is the ammonia deposition caused by the Sacramento waste water treatment plant, something that people hadn't considered before. But because the data are public, it is possible to have that kind of——

Mr. COSTA. Are predator bass——

Dr. RAMEY. And predator bass.

Mr. COSTA [continuing]. That consume a lot of the smelt. So how do we get there?

And then you have the gentleman from Davis, noted fish biologist, who indicates that as water temperatures continue to increase over the next four, five, six decades, that it may be impossible to recover some of these species.

Dr. RAMEY. In that one you are facing an ecosystem collapse.

Mr. COSTA. Yes.

Mr. BEAN. Sir, if I can answer your——

Mr. COSTA. Well, change. But, I mean, millions of years before—we obviously are impacting all of it, that's given. But the fact is that species have declined and become extinct as a result of a meteor hitting in the Yucatan Peninsula. I mean there are a lot of things that cause factors, right?

Mr. BEAN. Mr. Costa, if I can address your earlier question of how do we define success in this area, I think we can define it in a number of ways. We start with avoiding extinction of species we have identified as endangered. We have done a good job of avoiding extinction.

Second, and perhaps most importantly, measuring our ability to make a more secure future for these species. As I indicated, many species, although still endangered, have a clearly more secure future ahead of them because of——

Mr. COSTA. But is it fair, when we have multiple factors that are causing the decline of a species, to only use one?

Mr. BEAN. We have to address all the factors, sir. You are correct about that.

Mr. COSTA. But we don't do that.

Mr. BEAN. We try our best to do that.

Mr. COSTA. I can cite many examples where we are not.

Mr. BEAN. There are certainly many examples where it is very difficult to do that, and we have more or less success doing that. But in every instance we try to address every threat that we can.

Mr. COSTA. All right.

The CHAIRMAN. The time of the gentleman has expired.

Mr. COSTA. All right. Thank you very much, Mr. Chairman. Discussion to be continued.

The CHAIRMAN. It will, I know that. The Chair recognizes the gentleman from California, Mr. LaMalfa.

Mr. LAMALFA. Thank you, Mr. Chairman. As the discussion goes back and forth here today, we hear different ideas about the legitimacy of these bills being helpful. I mean I think what is important, how they are helpful isn't maybe necessarily with however recovery of species works now, but with people's ability to have transparency with it, to know what actually the data is, and if it is being applied correctly, and if you have a complete set of data.

So, I think, whether this is a dollar toward recovery, I think it can actually be helpful in that, because you have a broader range of data to work from, using local government, using local people's input on it.

You know, I have a situation up in Siskiyou County that has to do with water usage and water rights up in northern California, where they were bringing some group from Massachusetts in to help conduct the surveys and design a model, and they didn't really seem too interested in hearing from the locals, the farmers and ranchers, on that. Yet this is what is being imposed on people.

Now, when you hear that there are ideas for listing 145 or, by some other counts, maybe 374 new species—or considered for threatened or endangered status, I wonder if—the ultimate goal seems to tying up every single acre west of the Mississippi from usage by humankind for—whether it is very needed timber thinning and management, being able to access water supplies that are desperately needed for California's drought, a multitude of things that are being contemplated for people in these—the wise use of resources. Every one of these listings means much more time spent fighting with government agencies to try and have access to the resources. Every listing.

Now, in California, for example, we have the longhorn elderberry beetle—don't even get me started on the smelt—which was listed some years ago and has been in a de-listing process for about 8 years, and actually reached to the point where they have had the data brought to them, the recommendation by the Wildlife Service board that the de-listing move forward. Yet, for 2 years, they have been sitting on it. The answer I hear on that is they are not happy with one of the peer review—one member of a peer review board has issues with some of the way the data is collected.

Well, how are we supposed to—out here, whether it is the general public or us in this representation position—be able to have any kind of input whether the data, the collection process, is even working when they are counting burros for beetles? And yet we have very important flood control projects in northern California and probably across all the West, similarly, that are being held up because the agencies can't get off the dime and respond to a possible de-listing.

So, with that, I had a comment or a question I am seeking for you on that, Dr. Ramey. You have mentioned that lack of available data is hurting the process. We also have in northern California

the Sierra Nevada yellow-legged frog habitat designated, or a designation being contemplated. Yet the people involved doing the economic analysis have never visited the area, and are considering only the impact on Federal agencies, and maybe a little bit on utilities. Please expound on how the transparency would help our local governments to have a better input than just somebody that hasn't even visited the site.

Dr. RAMEY. I don't do economic analysis. But if I was to do something like that, I would certainly want to know where the species occurred, and then go from there to figure out, from higher-resolution mapping, where the potential economic costs would be.

Mr. LAMALFA. Who would best know what those economic costs would be?

Dr. RAMEY. Well, I would leave that to the economists to figure out. But obviously, local people have some knowledge there.

Mr. LAMALFA. Some or a lot?

Dr. RAMEY. Well, I was being—that's an understatement there. The problem there is that, whether it is scientific data or economic data, local data is going to be very, very valuable, and, in some cases, absolutely essential, especially when a species is occupying a very, very small area.

And speaking about economic analyses involving critical habitat, a number of those have been overturned, due to inadequate economic analysis. The coastal California gnatcatcher is one, for example. So, this is a relevant issue. It does spill over into economics.

The CHAIRMAN. The time of——

Mr. LAMALFA. And I think on the biological side, as well, at least seeking some input from local people on how things work, you know, maybe not the final word, but might be helpful to design a model.

So, thank you, Mr. Chairman. I yield back.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from New Jersey, Mr. Holt.

Dr. HOLT. Thank you. Let me begin by pursuing that line of questioning that we were just hearing. Let me address this, I suppose, to Mr. Bean and Mr. Rauch each. In what sense, in what circumstances, does best equal all?

The ESA says we should be using the best scientific and commercial data available. Certainly linguistically best does not equal all. In an evaluation situation, in actual practice, does best equal all? If you were trying to make a decision based on scientific evidence, do you want a data dump, or do you want some discrimination in what is best and relevant?

Let me ask Mr. Bean first, and then Mr. Rauch.

Mr. BEAN. Thank you, sir. I think that the Fish and Wildlife Service, when it makes its listing decisions, goes through a rulemaking process in which anybody who cares to provide any data that they——

Dr. HOLT. Could you speak into the microphone more, please?

Mr. BEAN. Sure.

Dr. HOLT. Thank you.

Mr. BEAN. When the Fish and Wildlife Service proposes to list a species, it goes through a rulemaking process in which anybody who wants to comment and provide any data at all can do so. The

Service must take all that into account. However, Congress has been clear that the decision to list or not list is to be based solely on the best available scientific and commercial data. And that does require the Service to make some informed judgment of which of the data at its disposal is most reliable, most scientifically defensible, most useful. So, yes, best does not equal all.

Dr. HOLT. Mr. Rauch?

Mr. RAUCH. Thank you. I do agree that best does not equal all. We do, as does Fish and Wildlife Service, accept all the data, and we actively seek out data, including data from States and others. Anybody who will give us data, we will accept it.

We have a 1994 policy between us and the Fish and Wildlife Service which talks about how we weight those data differently. Just because we accept it doesn't mean they are all of the same caliber. We will weight things more highly, for instance, if they are peer-reviewed, if they are public, they get much greater weight in our analysis. So we look at those factors, and that is spelled out in this 1994 policy in which we do grade the data. And we try to determine what is the best, and then rely on that.

Dr. HOLT. Thank you. Senator Seliger, you said that no one wants a species to be listed. I think those were your words——

Mr. SELIGER. Nobody wants species to be extinct.

Dr. HOLT. Well, in your prepared testimony I think you said "listed." No?

Mr. SELIGER. I am sorry, I don't recall.

Dr. HOLT. I will take a look again. But species listed—listing, of course, is the first step under the Endangered Species Act. With regard to some of the demonstrable successes of the Endangered Species Act—the iconic bald eagle or the American alligator or the great whale—are you arguing that listing in the ESA was not responsible for their revival, or that the revival no one wanted?

Mr. SELIGER. No, sir. I am certainly not, and I apologize, because the intention was to say no one wants to see a species extinct. Clearly, there can be situations—and there have been—where populations are so threatened that a listing is necessary, as long as it is based upon good science.

Dr. HOLT. Well, actually, I do have this letter from April 4 on your stationery, "No one wants a species to be listed. The method of preservation of a species is at the center of the debate."

Well, I am running out of time, so I will just finish with a statement, which is the ESA is an unusual law. It is one of the strongest environmental laws. It is based on a zero tolerance approach, which gives a lot of people heartburn. But it is demonstrably successful. There are many species that I think are vibrant populations now that would not be, but for the ESA. And so that listing, I think, has been critical to the prospering of the bald eagle, and the American alligator, the gray whale, and others.

So, I would ask you to think carefully about your words there, and consider the successes we have had. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Montana, Mr. Daines.

Mr. DAINES. Thank you, Mr. Chairman. I want to thank you, too, for your leadership on this important topic. The Chairman had field hearings in both Montana and Wyoming this past fall. I think

it is always helpful to get out of the world of academia in Washington, and out into the field, where reality exists.

It was summed up out in Montana at the hearing, that the ESA is like a 40-year-old ranch pick-up. It once served a useful purpose, but is in bad need of repair. And I think we sit here today, seeking to make this better, and to repair something that is now 40 years old.

And I can tell you, as I travel around the State of Montana, the threat of the listing of the greater sage-grouse is a major threat to our local economies and our everyday lives. Talking to the ranchers out there in eastern Montana, sometimes it is just refreshing to get to their perspective, as we hear all views on this around the impact of predators and coyotes, of ravens, eagles, hawks, and so forth, as it relates to—as well as habitat, and everything else. But you talk to multi-generational families out there on the ranches, they can tell you pretty quickly what causes sage-grouse populations to go up, and what causes them to go down.

I understand that in Texas the information provided by States, local governments, and other affected stakeholders informed the Fish and Wildlife Service enough to reverse its decision on the dune sage brush lizard as endangered. But, however, last week it has been discussed in this hearing the Fish and Wildlife Service listed the lesser prairie chicken, despite the State efforts. And I can tell you Montanans are very concerned that this decision that we saw happen in the last couple weeks is an indication of the decision that awaits us on the greater sage-grouse coming September, 2015. And I surely hope the intent is not to dismiss the recommendation from the respective 11 States that have prepared sage-grouse conservation plans.

In fact, Montana and Wyoming have the largest populations of sage-grouse, and are putting a lot of effort into conserving habitat and bird population numbers which we still hunt today in Montana. And as someone who strongly believes that this country would be a whole lot better if DC looked more like Montana and not the other way around, let me ask you, do you have any recommendations—maybe I could direct this to Dr. Ramey.

Any recommendations for the States of Wyoming and Montana in working with the Fish and Wildlife Service to provide the data that could have been missing in the lesser prairie chicken case, but was provided by the State and local governments in the lizards case? We are trying to maybe get an answer here before we take the test here in September of 2015.

Dr. RAMEY. The State of Wyoming makes all of its sage-grouse data public, and that is a great start. I don't know about Montana, but if it hadn't been for the fact that the State of Wyoming had made their data public, a number of analyses, including one we are to be publishing soon, wouldn't have been possible. So making the data public is very commendable, and it is a great way to lead.

Mr. DAINES. Any other comments, what we could learn from what happened just in the last month? Any of the panelists? Ideas that we don't fall into the same trap that happened?

Mr. BEAN. Sir, if I may, I would just respond to your concern that the decision on the lesser prairie chicken is somehow a foretelling of the future decision on the greater sage-grouse, I

would caution not to make that connection, because the circumstances are quite different. The lesser prairie chicken suffered a fairly dramatic population collapse. Its numbers are a small fraction of sage-grouse numbers.

Perhaps most importantly, the 11 States with sage-grouse have been working for the last 4 years cooperatively with the Fish and Wildlife Service, with BLM, with Natural Resources Conservation Service, to put together programs and plans to address the threats to that species. They are making real progress in that. So I think that will be decided on its merits, independent of the decision for the lesser prairie chicken.

Mr. DAINES. I sure hope so, because I think you have some important stakeholders there in Montana that—we desire, I think, the same outcome here, of protecting the species. But I—we really do believe that the folks back home oftentimes are closer to the issues than the folks who are thousands of miles away, here in Washington.

Is there something—moving back to Dr. Ramey, is there something Congress can do? You mentioned the transparency with Wyoming data. Anything else that States and local governments could do—to have a stronger voice in this process? Would H.R. 4317 help in that regard?

Dr. RAMEY. Well, let me say I do concur with Rauch and Bean here, that best does not equal all. However, I am going to add to that, that you only get to best available by considering all the data. And I think that that is the frustration that local governments, tribes, and States have, is that their data are frequently not considered in a decision. And it is extremely frustrating.

And just to use the example of the *Agua Caliente* v. *Scarlett* case on critical habitat and peninsular bighorn sheep, that particular case resulted because the tribes and others had better data, and they had to go to court in order to force the decision on a critical habitat, which resulted in about a 50 percent reduction. But that allowed the conservation effort to be more focused on what is most important for the animals and aid their recovery. And they are almost recovered.

Mr. DAINES. Thank you.

The CHAIRMAN. The time of the gentleman has expired. The Chair recognizes the gentleman from Michigan, Dr. Benishek.

Dr. BENISHEK. Thank you, Mr. Chairman. I would like to thank you for holding this hearing today, and I would also like to take this opportunity to enter additional testimony from both the American Loggers Council and Senator Tom Casperson, who represents the 38th District of Michigan into the record.

These folks couldn't be here in person with us today, but they strongly support these bills that work to reform the Endangered Species Act. I appreciate their support and work to conserve species that are important to Michigan.

[The information submitted by Dr. Benishek for the record follows:]

PREPARED STATEMENT OF THE AMERICAN LOGGERS COUNCIL BY DANIEL J. DRUCTOR, EXECUTIVE VICE PRESIDENT ON H.R. 4315, H.R. 4316, H.R. 4317, AND H.R. 4318

The American Loggers Council (ALC) appreciates the opportunity to submit written comments in support of four recently introduced bills that would make signifi-

cant changes in the administration of the Endangered Species Act. These four bills, H.R. 4315; H.R. 4316; H.R. 4317 and H.R. 4318, all suggest improved procedures and accountability for decisions to list species as threatened or endangered under the act. We would like to thank Representatives Hastings, Lummis, Neugebauer and Huizenga, respectively, for introducing these bills.

ALC is a coalition of some 30 State logging associations from throughout the country. Our members collectively represent over 10,000 family owned businesses that employ over 50,000 workers. Our members are largely located in rural communities and support an industry that typically is the mainstay of the local economy. Each and every one of our members can tell a convincing story about how the Endangered Species Act has affected their operations and personal lives whether they be on Federal, State, private or tribal lands and they understand the need for the reforms embodied in these proposals. Transparency in decisionmaking; public access to data, research and assumptions regarding listing decisions; and modernizing the process for legal challenges of the act's administration are all reforms that we strongly support.

Often, the data, research and assumptions that lead to a decision to list a species is a mystery to the public. In our experience, the U.S. Fish and Wildlife Service relies heavily on internal research and scientific expertise and to academia for information about candidate species. It is our opinion that scientists who are invited to provide input to the agency and provide the scientific basis for making a listing decision is often an exclusive club of hand-picked individuals. In the current process, it is not unusual for outside information and research to be ignored because it does not support preconceived positions of the agency or it may originate from sources the agency believes has an economic interest in the decision. There is plenty of evidence that the agency excludes valid and credible information in its quest for "the best scientific information available." There is no better example than the northern spotted owl. Listed in 1990, credible evidence was provided to the U.S. Fish and Wildlife Service that questioned the *dependency* of the owl on old growth habitat. Information was also provided that suggested the barred owl was a significant factor contributing to the decline of spotted owl numbers. Both of these assertions were ignored by the agency as its selected group of scientists (a cartel is an appropriate description) who did not want to believe these suggestions to be credible. Twenty-four years later, the agency is now advocating for the management of second growth forests for habitat recruitment and has determined that more habitat exists today than when the owl was listed as a threatened species. Also, the agency recently completed an environmental impact statement that authorized the killing of barred owls to reduce competition with its close cousin, the northern spotted owl. You can imagine the chagrin of the tens of thousands of forest industry workers who lost their jobs as a result of the listing of the northern spotted owl.

Another example of the need for transparency is in the agency's reliance on computer models for predicting a species reaction to management alternatives. Population data is often lacking and when it is available it is often discounted in deference to the attitude that "the amount and quality of habitat is more important than the population of the species." So, the agency will use a computer model to predict the amount of a species' habitat that will be available over time and under different management options. The problem with this approach is that the prediction the model makes is entirely dependent on the quality of the data and assumptions that go into it. These inputs into the model should be fully disclosed and explained to the public. Also, the certainty associated with these inputs should be disclosed. Are they best guesses? Do they represent a consensus of the scientific community? Do they consider alternative views, opinions or research? Or is it all hardwired to predict a preconceived outcome? These are questions the public deserves an answer to.

Finally, H.R. 4318 would impose a $125 per hour limit on attorney's fees for suits filed under the Endangered Species Act. This limit is currently included in the Equal Access to Justice Act and we support including it in ESA litigation, as well. There is no question that certain special interest groups have exploited ESA litigation as a means to finance their existence and sustain their litigious activities. Just this year, the State of Oregon settled a lawsuit brought by an environmental organization involving the marbled murrelet. The suit alleged that the management of State forest lands in Oregon was resulting in the "take" of marbled murrelets. The marbled murrelet is a seabird that spends 90 percent of its life in the ocean to feed. It spends 10 percent of its life inland nesting in coastal forests. The suit was based entirely on habitat modification and a dead or injured murrelet was never produced. The State agreed to reduce timber harvest levels on the subject forest lands by over 80 percent to settle the case even though the land in question is required by the State's constitution to generate financial resources for public education. But to avoid

going to court, the State agreed to a huge reduction in timber harvest levels and paid the environmental organization's attorney $391,000 of taxpayer's money to settle the suit. The attorney never stepped foot into the court room. This is but one example of the kind environmental extortion that currently occurs under the existing litigation process.

In summary, the American Loggers Council urges the committee to pass these bills and send them to the Floor of the House of Representatives for consideration.

We appreciate the opportunity to provide these comments.

PREPARED STATEMENT OF TOM CASPERSON, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Legislation before the Natural Resources Committee to amend the Endangered Species Act (ESA), H.R. 4315–H.R. 4318, offers much needed reforms that should be approved by the committee as it will help address concerns I hear about routinely from my constituents and residents of Michigan.

As the State Senator for most of Michigan's Upper Peninsula (UP), my district covers an area that is bigger in size than nine other States, yet has a mere 270,000 people. Given the make-up of my district and the land-based economic activities that most residents depend upon to make a living and support our communities, which are historically based and culturally centered, we have been significantly and adversely impacted by various environmental laws and regulations including the ESA. It is common to hear from constituents who strongly believe that changes are needed to environmental laws and regulations, with the ESA being one of the laws most in need of changing.

That is why I appreciate the work of the ESA Working Group and the introduction of legislation to reform the ESA including H.R. 4318 by Congressman Bill Huizenga of my home State. The purpose of H.R. 4318 is to help make ESA decisions less susceptible to litigation which would be a significant and valuable victory for taxpayers and those who repeatedly see the ESA used to stifle reasonable use, conservation, and enjoyment of the natural resources.

As we have seen in Michigan, environmental groups and so-called animal welfare groups are repeatedly using litigation to impact decisions made under the ESA. And, in some cases their attorneys are being awarded huge sums of money ranging from $300–$500 per hour with taxpayers covering that cost when they prevail in ESA cases.

It is frustrating enough for residents of Michigan to have to continue to endure the impacts of those decisions on their lives, but it adds insult to injury to have attorneys profiting with their hard-earned dollars when the tax money could instead go to something much more important such as transportation or education needs. To address this, H.R. 4318 is a common sense measure to place the same $125 per hour cap on ESA cases that applies to other government litigation cases.

A few examples in Michigan will help to portray why reform is needed to the ESA. Most recently, the wolf population has been a hot topic in the UP and across Michigan as most UP residents call for more management and control to curb the negative impacts that a growing wolf population has had on residents, pets, livestock, wildlife and visitors.

Wolves were recently delisted from the endangered species list in January 2012, but the delisting was long overdue. When wolves were listed as an endangered species more than three decades ago, a recovery goal of 200 animals was set which was the target number at which time the animals would be delisted. However, delisting didn't happen for years after that goal was attained with at least part of the delay brought on by certain animal welfare groups challenging the process and bringing litigation.

During that time, the wolf population in Michigan expanded to approximately 700 wolves, well above the recovery goal of 200 in Michigan alone. Our neighboring States of Wisconsin and Minnesota have approximately 800 and 2,200 wolves respectively. This has led to many negative impacts on UP residents where the wolves are concentrated in Michigan. Farmers are losing livestock to wolves, family pets and hunting dogs have been killed, other wildlife are being impacted, and wolves are even entering communities such as the city of Ironwood where eight had to be killed within the city itself to address residents' fears that they were becoming too habituated to humans. A wolf was also hit by a car in Escanaba in December.

Delisting has allowed us to move forward as a State to enact some management tools, but had we been able to address the situation earlier, UP residents would not be enduring the impacts they see from the wolf population today.

In addition, most economic activity in the UP is dependent on land-based economic sectors including forestry and mining. The ESA has unreasonably and negatively affected those sectors with environmental groups and bureaucrats successfully using the laws and regulations to slow down sustainable use of the land.

For example, there are three Federal forests in Michigan, with two of them being in the UP. Each Federal forest has a forest service management plan in which an "allowable sales quantity (ASQ)" is established. This is essentially a timber harvest plan. Since 1986 when the first plans were written, the U.S. Forest Service has never sold the ASQ of timber in the forest plans for the Ottawa and Hiawatha National Forests in the UP. Specifically, over the last several years, less than half of the timber required to maintain forest health was harvested with the amount ranging from 38 to 45 percent of ASQ.

Many believe, myself included, the lack of management on forestland is directly attributable to environmental laws, including the ESA, which has been used to stall or prohibit management efforts.

This has left our forests in poor health, which is in part responsible for the natural disasters that have befallen them, and it also equates to loss of jobs and economic activity in rural areas that depend on the land-based industries to survive. For example, in 2010, the Ottawa and Hiawatha National Forests cumulatively fell short of annual ASQ by more than 115 million board feet. This equates to a loss of 1,265 jobs using a calculation based on 1 million board feet of harvested timber providing enough raw materials to sustain 11 direct jobs and multiple other indirect jobs.

In addition, the ESA was recently cited by the Environmental Protection Agency (EPA) in its many objections to the development of County Road 595 in Marquette County. The road would have addressed public safety concerns and aided in economic development opportunities related to forestry and mining. However, after much local and State support and hundreds of hours of negotiation by the Marquette Road Commission to try to address concerns, the road project was not advanced due to concerns from Federal agencies including the EPA, U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service.

For example, in a 44-page EPA document titled "Responsiveness Summary EPA Objection to the Issuance of a Clean Water Act Section 404 permit to construct County Road 595" from December 2, 2012, the following statement was made: *"The project could cause impacts to Kirtland's warbler (Setophaga kirtlandii) and Canada lynx (Lynx candaensis) which are protected under the Endangered Species Act and which have the potential to be present within the proposed CR 595 corridor."*

The document also points to concerns about impacts on wetlands and references various threatened and endangered species that *could* be located in those areas which would have been impacted. It is significant to note, however, that the applicant was willing to mitigate any impacts on wetlands to a much higher degree than any impact they would have caused—and at one point offered to mitigate 22 acres of wetlands with an astounding offer of 1,600 acres of wetlands.

In short, it was a tremendous loss for the UP when the Federal agencies used various environmental regulations and hoops to reject the united local and State efforts to build County Road 595.

While the ESA has served a purpose, it has been abused and used as a tool by those who do not want to see human activity on natural resources. There must be more balance between environmental regulations to protect truly sensitive areas while allowing sensible activity as well, including economic development and recreational uses.

Today's law does not provide that balance to ensure property rights and use are maintained and promoted where appropriate, and that is why the committee should vote to approve H.R. 4315–H.R. 4318 to help provide residents of Michigan and its sister States some relief from those who take advantage of originally well-intended laws that now are in need of reform to allow States to respond appropriately to local needs, provide transparency and allow better use of tax-payer dollars.

Dr. BENISHEK. I represent the northern half of the State of Michigan, and have seen firsthand how the ESA impacts my district. For example, when a county wanted to build a road, the ESA said the project could cause impact to Kirtland's Warbler and Canada Lynx, which are protected under the Endangered Species Act, and which have the potential to be present with the proposed coun-

ty road corridor. Despite offers by the county to include thousands of acres of offsets for the potentially impacted area, the road was unable to be built. The regulators could not be satisfied.

Commissioner Jankovsky and Dr. Ramey, do you think that the ESA adequately takes into account State and local actions for conservation that may already be under way?

Dr. RAMEY. I think one of the issues here is that the State and local governments, and tribes, may produce conservation plans and invest heavily, as Huffman had mentioned, in conservation efforts, but not find out whether they receive any credit for that until the time of a listing decision, for example. And that, I think, is a strong disincentive for conservation efforts for State and local governments to invest in those.

And it would be best if, under the PECE policy, the Policy on Effectiveness of Conservation Efforts, if the services worked more cooperatively with these State, tribal, and local governments, and gave them some assurances in advance that their efforts are not going to be, essentially, in vain.

Dr. BENISHEK. Mr. Jankovsky?

Mr. JANKOVSKY. Yes, and I would just add to that. I think at the local level, and especially with local land owners, we almost feel as though we are not being heard. And we look at these issues and how important they are to our economies, and also the conservation of the species, and it is—we are not being heard, and that is our concern.

Dr. BENISHEK. A couple more questions for you two. If you listen to those folks that have been opposed to 4315, the status quo is apparently working just fine when it comes to scientific transparency. To them, the legislation is not necessary to publish the data on the Internet.

Can you, from your perspective, tell us why we need this legislation?

Mr. JANKOVSKY. First of all, I don't think the transparency is there. I don't think you can get to the data. I think that local governments are now—especially after the spotted owl—are looking at what the impacts are. The impacts are immense to our economies and to our citizens and to how we operate—and to the ability to be able to continue into the future as productive economies. So that is the concern.

That is why, if you can have this data transparent, so we can be at the table, and we can look at it, and we can dissect it, and we can respond back and have a dialog, it is going to make a big difference for the local governments.

Dr. BENISHEK. Any further comment, Dr. Ramey? I just point this out because, you know, here we had, in my district a potential for huge economic development with the construction of a road that every single elected official in the State was in favor of, which the Michigan Department of DNR was going to oversee the wetlands, and that.

But when the answer that you get from the Environmental Protection Agency is that there is a species that has the potential to be present as a reason for stopping an effort for a local economic activity, it is a very bad answer for the hundreds and maybe thousands of people that don't have a job. There are no data to support

the fact that these endangered species, animals, were even there. It is just that they had the potential to be there. It is very difficult for people in the local community to trust the bureaucrats in Washington when they give an answer like that that affects hundreds of people.

Well, I am out of time, but thank you so much.

Mrs. LUMMIS [presiding]. I thank the gentleman. The Chair recognizes herself for 5 minutes.

Mr. Bean, Fish and Wildlife Service recently requested nearly 40 new employees for ecological services as part of the sage-grouse initiative. How many of those employees will be on the ground, implementing conservation plans like Wyoming's plan, which is, by the way, Fish and Wildlife Service-approved?

I would be delighted to have that information. What I understand is most of them will be desk jobs here in Washington, but I would love to see a breakdown of that.

Mr. Seliger—is it Selinger?

Mr. SELIGER. It is Seliger.

Mrs. LUMMIS. Seliger.

Mr. SELIGER. Yes, ma'am.

Mrs. LUMMIS. OK. Mr. Seliger and Mr. Jankovsky—now, did I get that right? Thanks. Could you each think of specific examples where better cooperation with the Federal Government on data would result in better outcomes, both for species and for the State and local governments that you represent that are trying to recover species before they are listed?

Mr. JANKOVSKY. Well, we are definitely the individuals on the ground and we work with the private land owners. We actually have a good rapport with the State governments and, to some extent, for the Federal employees that are working at a local level.

And so, we really can see what the impacts are. And through voluntary basis, and also by working with the Federal Government, we can make things happen at the local level. And if we don't have the cooperation from Washington, DC, if we are not being heard, then land owners and local governments are just going to—we are not going to work with the Federal Government, because there is just an impasse.

Mrs. LUMMIS. Mr. Seliger?

Mr. SELIGER. Yes, ma'am. The local—I say local—State, in this case, scientists and biologists are as much an asset to Fish and Wildlife Service as they are to the individual States, I believe.

It was interesting recently that the lesser prairie chicken's threat level, if you will, or its priority status was eight, which is relatively low, and then was moved to two. And I am not aware of the sort of definitive evidence that was presented for a serious move like that, but it appeared to be motivated somewhat more by settlement deadlines with litigants than based upon any change or information, scientific information, generated that most likely would have been generated in those State Fish and Wildlife Services.

Mrs. LUMMIS. Thank you. Mr. Bean, the Fish and Wildlife Service has a peer review process, correct?

Mr. BEAN. Yes, that is correct.

Mrs. LUMMIS. Dr. Ramey, can the Service guarantee scientific integrity while scientists are denied the underlying data and methodologies?

Dr. RAMEY. I think one can go and look at the Office of Management and Budget discussions concerning the Information Quality Act, and that provides for a rebuttable presumption that peer review is adequate, and that it requires that there be reproducibility in data and methods and analysis by an informed member of the public.

So, there are plenty of examples across the field of science where peer review has been inadequate. It is a useful tool. It is an imperfect tool.

Mrs. LUMMIS. Following up, Dr. Ramey, should the Fish and Wildlife Service and the National Marine Fisheries Service be basing listings and other important decisions on studies and opinions that cannot be accessed or verified?

Dr. RAMEY. That is a great question for the people of this country. It is clearly in violation of the Information Quality Act, that if you can't obtain the underlying data, there is no reproducibility. You can't ask any questions. Again, you can have all the peer reviews you want, but unless you have the access to that, it is different.

And peer reviews are sometimes incredibly conflicted. On the hookless cactus, one of the peer reviewers was actually on the board of directors of the NGO that litigated to list the species. Another one was one of the original authors of the taxonomy of the species. I mean that is not an independent review.

So these things have an opportunity to go—I know that Dr. Courtney has worked to try and prevent that, but it is—the problem is that science is a human process. It has its faults, as well. But it——

Mrs. LUMMIS. We are——

Dr. RAMEY [continuing]. Fundamentally goes back to the data.

Mrs. LUMMIS. We are indeed fallible people. I thank the panel. And my time has expired. I yield to the gentleman from Arizona, Mr. Gosar.

Dr. GOSAR. Thank you, Chairman—Chairwoman. Mr. Bean and Mr. Rauch, you just talked a minute ago about a lot of your data coming from the Department of Defense, and that that data is restrictive on their direction.

So, my question is, as any NGO, environmental, or conservation group who has initiated sue-and-settle been privy to that information that would otherwise not be disclosed to anybody else?

Mr. BEAN. Not to my knowledge, sir, no.

Dr. GOSAR. Mr. Rauch?

Mr. RAUCH. No, not to my knowledge.

Dr. GOSAR. Mr. Ramey, are you familiar with anything?

Dr. RAMEY. No, I am not.

Dr. GOSAR. Would you go back and—I would like all the members of this panel to come back and answer that, post-operatively. I am a dentist, so if I speak in medical terms—I would like to have a conversation in regards to that, because I actually think there is.

So, Mr. Bean, last month Fish and Wildlife Service designated over 700,000 acres of land in southern Arizona as critical habitat—

now you are going to see where this question came about—in regards to the rarely present jaguar. I think DoD has a big overlap with that aspect.

Game and Fish Assistant Director for Wildlife Management, Jim deVos, stated at the time, "I find it difficult to justify designating critical habitat for a species that is so rarely found in Arizona. And looking at the available data on the presence of jaguars, there has been no documentation of a female jaguar in Arizona for nearly a century." You would agree?

Mr. BEAN. I don't have any independent knowledge, sir, I am sorry.

Dr. GOSAR. OK. Such designations should be based on good science and effective conservations, which are both lacking with this designation. This designation does nothing to further the conservation act on the jaguar. What best available scientific and commercial data was used to justify this listing?

Mr. BEAN. I don't know the details, I am going to have to supply that to you post-operatively, as you say.

Dr. GOSAR. OK, I would expect that. Mr. Bean, last night the Fish and Wildlife Service announced that they were reopening the comment period going to designating a critical habitat for the New Mexico meadow jumping mouse, commonly known as Rip Van Winkle, the sleeping mouse. This proposed rule seeks to stifle economic development, harm grazing on over 15,000 acres in New Mexico, Colorado, and my home State of Arizona. Wild Earth Guardians report that this rodent typically hibernates for 10 months out of the year. Environmental groups have been pushing for this designation since 2007.

Is your agency pushing for the designation of critical habitat for the sleeping mouse, based on actual science, or to appease extremist groups that are threatening lawsuits?

Mr. BEAN. Let me answer that this way, sir. I don't know the facts of this particular instance. But I can assure you that in no instance is the Fish and Wildlife Service proposing critical habitat to appease the interests of extremist groups. I can assure you of that.

Dr. GOSAR. So we would like to have a review on sue-and-settle. So we would like, once again, going back to the sue-and-settle aspect, and privy documentation.

Dr. Ramey, can you provide examples of where data sharing has been beneficial for species conservation, and examples of where it is needed?

Dr. RAMEY. Certainly the delta smelt case is probably the first and foremost in my mind, because we just published on that about a year ago. Identifying the threats is extremely important to allocating conservation efforts.

On the boreal toad, we were able to obtain data on the genetics and the distinctiveness of the various groups, and we found large amounts of missing data in the data sets, and the lines were basically arbitrarily drawn around those groups. And so, that independent re-evaluation allows for a refocusing of research needs and conservation effort.

In terms of the California condor, peregrine falcons, there had been previously thought to be human disturbance of nest sites as

being a problem. However, when the data were in, that was not the issue; DDT and predation were. And so, having open access to data allowed for that kind of re-analysis.

Like I said, the greater sage-grouse is an example where it is sorely needed. I mean we don't have the basis of the data that was cited 64 times in the 2010 listing decision. On the Gunnison sage-grouse, there is no measurement data, there is no color data. The supposed historic range is entirely based upon speculation, no data. So, those are two very relevant recent cases where that is needed.

Dr. GOSAR. So, Mr. Bean, is there a case that we have made mistakes in regards to restrictive habitat? I can think of one that I kind of want to hedge my bet on this, and that would be the spotted owl, Mexican spotted owl.

Mr. BEAN. I am sorry, sir, I didn't hear your question.

Dr. GOSAR. Have we made any mistakes in regards to habitat restrictions in regards to endangered species?

Mr. BEAN. The Fish and Wildlife Service has, on occasion, delisted species that it originally listed on the basis of error, taxonomic error or other informational defects. There are relatively few of those, but, yes, there have been some of those.

Dr. GOSAR. Mexican spotted owl would actually be one of those, wouldn't it be, because we have an overgrowth of timber, and Mexican spotted owls really don't like that, do they?

Mr. BEAN. I am sorry, sir, I don't have the facts——

Dr. GOSAR. I think it proliferates the common barn owl. And what we have done in Arizona and a lot across the West is we have actually allowed these forests to be over-occupied. And we in Arizona have become victims of these catastrophic fires because of this.

I hope that you would really reconsider yourself, and look at some of this critical habitat in a conscientious way, and utilize State and local maps. Thank you.

Mrs. LUMMIS. The gentleman's time is expired. The Ranking Member has one follow-up question, after which we will excuse this panel.

Mr. GRIJALVA. Yes, Dr. Courtney, in the testimony today—follow up on something that was said. If peer reviews in and of themselves are imperfect tools, what would be the alternative, number one?

And, number two, in the many peer reviews that you conducted, there is publicity attached and there is full transparency? And that is the question.

Dr. COURTNEY. Well, thank you, first, for giving me the last word.

[Laughter.]

Dr. COURTNEY. Peer review is—it is the best tool we have. Like democracy, right? It is the best tool we have. If it is carried out transparently, if the process is carefully designed, if all records are kept, then it gives you a clear record of how evaluations are made, and that then becomes useful for a decisionmaker. Is it always going to give us the best result? No, I think it should be an ongoing process.

And to answer Mr. Flores' question from a little bit earlier, the tools that we have, like peer review and like some of the processes

that are in place within the two agencies, they are good tools. Whether they are used as openly and as commonly as we might like, that probably can be improved, and——

Mr. GRIJALVA. OK.

Dr. COURTNEY [continuing]. I am very much in favor of things being done in public.

Mr. GRIJALVA. Thank you very much, Madam Chair. And in closing, I just want to—for the record—that we did have a jaguar in Arizona, Macho B. Unfortunately, that jaguar met its demise at the hands of Arizona Fish and Wildlife in a capture.

With that, I yield back.

Dr. GOSAR. Madam Chairwoman? To correct the record, it was a male jaguar, not a female.

Mrs. LUMMIS. I thank the gentlemen. We have had one of our members return. The gentleman from Florida, Mr. Southerland, is recognized for 5 minutes.

Mr. SOUTHERLAND. Thank you, Madam Chair. My questions will be brief. I am curious, as I am looking through this data, Mr. Rauch, I want to ask you a question.

I am looking at the FWS 2011 90-day finding that the Center for Biological Diversity has petitioned to list the 374 aquatic species in several Southeastern and Gulf States. The listing may be warranted, is their finding.

I am just curious. I am on the Fisheries Subcommittee. I know that the red snapper is clearly an irritating fish to you guys. I am just curious. How can we do 90-day findings for 374, and yet we can't get good findings for one fish in the South Atlantic for over 3,000 days?

Mr. RAUCH. Thank you for the question.

Mr. SOUTHERLAND. I am sure you appreciate that question.

Mr. RAUCH. I do appreciate the question.

[Laughter.]

Mr. RAUCH. We have had many discussions, I think, in this very chair on this topic. I can't speak to Fish and Wildlife Service's petition. I do know that it is sometimes difficult for us to make 90-day findings on very large numbers of species when we have similar 90-day findings. The standard for a 90-day finding is much lower than the standard for an ultimate listing. That is based on substantial information from the petitioner that indicate it may be warranted, which is a particularly low standard. We then would engage in the kinds of—the status review process, which is more akin to the stock assessment process that you are familiar with with the red snapper. That would only occur after that 90-day finding is met. So there is a much lengthier process after the 90-day finding is met.

I will say that, in terms of the South Atlantic red snapper, as I think I——

Mr. SOUTHERLAND. How lengthy? I am just curious. How lengthy should that process be?

Mr. RAUCH. Under the Endangered Species Act? We have up to—by statute, we have up to a year.

Mr. SOUTHERLAND. OK.

Mr. RAUCH. To finalize that process. That includes the 90 days.

Mr. SOUTHERLAND. So, therefore—and I know we are jumping tracks, but this is the same, the same Department, OK, same agen-

cy. So, when you mention those—you know, the timeframe there, the expectation that the people that live in the South Atlantic, the Gulf of Mexico, regarding one fishery, one, and then it has taken over 3,000 days certainly seems to be an inconsistency of thought for the Department.

Mr. RAUCH. So I will say that we have scheduled that stock assessment.

Mr. SOUTHERLAND. Well, that is wonderful.

Mr. RAUCH. For the end of this year, yes. At the end of 2014 we are—we are concerned, as well, that that stock assessment has lagged behind for the South Atlantic red snapper.

Mr. SOUTHERLAND. OK. So that is really just my—I mean I am just amazed, as I heard—as I read the data for today, to know that the inconsistency by the Department on this particular fish that—Magnuson clearly, clearly outlines the economic value of the fish—is a determinant factor. It must be, according to law. That is not interpretation; it is clear that that fish must be—must have the surveys in a timely manner. I just find that inconsistency to be glaring, and so I am thrilled to hear you state that that is scheduled for the next year.

So, really, that is just—that is my only point. And, Madam Chair, I yield back.

Mrs. LUMMIS. I thank the gentleman, and I very much want to thank this panel of witnesses for their valuable testimony.

Members of the committee may have additional questions for you, and we would ask that you respond to these in writing. The hearing record will be open for 10 business days to receive these responses. And, again, with our tremendous gratitude, we excuse this panel, and will now hear from our second panel of witnesses.

We are pleased to be joined by Ms. Karen Budd-Falen, of Cheyenne, Wyoming; Mr. Robert Percival, of Baltimore, Maryland; Mr. Michael Bean, and Mr. Sam Rauch, who were with us on our last panel, will continue and join us on our second panel, as will Mr. Kent Holsinger, from Denver, Colorado.

To the gentlemen who so patiently sat through the first panel and now have the pleasure of doing so again, if you wish to get up and stretch your legs during the testimony of the three new witnesses we have, feel free to do so, and then come back and join us, as we may have additional questions for you. You will not be asked for prepared testimony for this panel, since we had the pleasure of hearing from you during the first panel.

So, now, I would like to thank and welcome our current panelists. And the Chair recognizes herself to introduce the first witness on this panel.

Ms. Budd-Falen is from my home State of Wyoming. She has been a tireless researcher on the subject of agency funds that have been used for payments to attorneys who sue the Federal Government and either receive payment for their legal fees and costs in settlements, or in the court, and how this has affected the budgets of Federal agencies.

Most of the information she has assembled has been anecdotal, as we don't have, currently, a formal system of reporting those dollars that are paid out of agency budgets for attorney's fees, which is the subject of one of the bills before us today. I deeply want to

thank Ms. Budd-Falen for her work in bringing this issue to our attention. And I welcome her to present for 5 minutes.

As Chairman Hastings would say, if he was here, the green light indicates you are good to go. The yellow light asks you either to talk faster, or summarize more quickly. The red light truly is the conclusion of your spoken testimony. And we do have the advantage of your written testimony, so don't feel that, just because you didn't get to say it all, that it has not been called to our attention.

Again, gratefully, for the second panel the Chair recognizes Ms. Budd-Falen for 5 minutes.

STATEMENT OF KAREN BUDD-FALEN, OWNER/PARTNER, BUDD-FALEN LAW OFFICES, CHEYENNE, WYOMING

Ms. BUDD-FALEN. Thank you, Congressman Lummis and members of the committee. My name is Karen Budd-Falen, and I am a rancher and attorney in Wyoming. I represent many ranchers, land owners, and local governments who feel the direct impacts of the Endangered Species Act and critical habitat designations.

There has long been a concern that litigation, rather than science, is overtaking decisions under the ESA. Although there has been a great deal of discussion and consternation, large settlement agreements are happening right now, dealing with multiple species. But that has actually always been the case. It was very interesting.

In preparing for this testimony, I located a settlement agreement that was agreed to in the Clinton administration, where the Clinton administration agreed with Defenders of Wildlife and Fund for Animals that it needed to review the candidate list for 443 species in a period of 5 years. Under that settlement agreement you had species that the environmental groups that sued believed were languishing on the candidate list, and that needed review. So they created a time deadline to deal with that.

At the end of the 5-year time deadline, the Clinton administration determined that it simply could not comply. Now, certainly at the end of that timeline you had some issues with appropriations, but there were 4 years in which the Clinton administration could comply, and it simply could not. The Fish and Wildlife Service then issued a listing final priority guidance, and I think the language of that guidance, was important as it was to President Clinton as it is today.

The guidance strongly stated that good science, rather than litigation, should drive the listing of species under the Endangered Species Act. The decision also said that to continue to deal with these species would result in increasing backlogs as species are currently being petitioned. So, you have the mega-settlements of today, in which the Fish and Wildlife Service has agreed to take 1,053 actions over the course of 5 years.

The settlement agreements did not stop the Center for Biological Diversity from filing additional petitions. And, as you heard the gentleman speak of earlier, Center for Biological Diversity has filed a petition for hundreds of mussels and fish and other species in the South Atlantic, as well as species in every other State. So, it begs the question: How is the Fish and Wildlife Service going to con-

tinue to deal with this? And the reality is they don't have the money to do it.

Now, although the Fish and Wildlife Service and the National Marine Fisheries Service can continue to blame Congress for its problems, in my opinion sue-and-settle actually does make a difference. And what I would cite to this committee is the run sheets the Department of Justice recently released. Those run sheets listed what the Department of Justice believed was its litigation for approximately 3 years and 3 months. Only dealing with Endangered Species Act, only relating to the wildlife section in the Energy and Resources Department.

Now, the run sheets didn't total the attorney's fees paid, so I did. We just simply did the math with a large calculator. We figured out that, in those 3 years and 3 months, 573 cases had been filed; 489 of those were filed by environmental groups. Only 19 of those cases were filed by what you would call industry groups or water districts; 65 cases were filed by individuals, so we couldn't tell their affiliation. And in that time period, $52,518,628.93 had been expended in attorney's fees.

I think that that does speak to the issue regarding litigation and attorney's fees. I think that the Justice Department numbers are wrong, because GAO report after GAO report has reported that they do not have a good method of tracking. I think that we need to look at the priorities. Although the Center for Biological Diversity will tell you that I am simply willing to kill every endangered species on the planet, that is absolutely not true. But we have to look at priorities, and we have to look at our citizens as we are doing it. That is who you represent.

With that, I would stand for any questions. Thank you.

[The prepared statement of Ms. Budd-Falen follows:]

PREPARED STATEMENT OF KAREN BUDD-FALEN, OWNER/PARTNER, BUDD-FALEN LAW OFFICES LLC, CHEYENNE, WYOMING ON H.R. 4316 AND H.R. 4318

My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in a family owned ranch west of Big Piney, Wyoming. I am also an attorney specializing in environmental litigation (including the Endangered Species Act). I represent the citizens, local businesses, and rural counties and communities who may not necessarily be the defendants in litigation under the Endangered Species Act ("ESA") but who absolutely feel the consequences that are the results of endless ESA litigation. My clients, friends and family have to live with the results of the species' listings and critical habitat determinations; my clients, friends and family also pay the litigation fees to feed the litigation machine.

If I had to select one word to describe the bills before you today, it would be honesty. As it currently stands, there are only two ways for the general public to get information related to why a species was listed or critical habitat was designated under the ESA, or whether attorney's fees were paid related to ESA litigation. With regard to the basis for listing or critical habitat determinations, the only publically available source of information is through filing a Freedom of Information Act ("FOIA") with the U.S. Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") asking for the data. While a listing or critical habitat rulemaking published in the Federal Register may describe "why" the FWS or NMFS believed that listing or critical habitat designation was appropriate or prudent, the agencies do not have to publish sources of the "best scientific and commercial data" used to make their decisions. Unless Federal court litigation is filed and an administrative record is produced, the "best scientific and commercial data" is only available through FOIA, at a cost of $24, $42; and $61 per hour for search and managerial review time, $.15 per page for black and white copies and $.90 per page for color copies. Maps and odd size reproductions cost more. *See* 43 C.F.R. Part 2, Subpart G.

Public information regarding payment of attorneys' fees for ESA litigation is equally difficult to access. Although it is possible to publically search Federal court databases through PACER [Public Access to Court Electronic Records], those searches are based upon individual Federal courts and only by party name. The public then has to research the docket sheet for each case to determine if attorney's fees were paid and why. There is a service charge that has to be paid to be able to search PACER and downloading any document bears an additional cost. This is very difficult and expensive for taxpayers who are footing the bill for the attorneys' fees payments.

In reviewing these four bills and moving away from the hype that even the subject of the ESA seems to provoke, there is nothing evil or right-wing about this legislation. These bills change nothing of substance to the requirement that Congress commanded the Federal agencies to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1532(b).

The proposed legislation can be described as follows:

H.R. 4315 requires that the information and data used to list species as threatened or endangered and make critical habitat decisions be put on the Internet. It does NOT require the FWS or the NMFS to gather more, different or additional data; it does not change the existing requirement that the "best available scientific and commercial data" be used; it does not add to the citizen suit provisions or create a new cause of action to sue to change the listing process; it does not include any new deadlines. Under this bill, deference will still be owed to the Federal agency regarding what to consider as the best scientific and commercial data available. *See Hawksbill Sea Turtle* v. *Fed. Emergency Mgmt. Agency*, 11 F.Supp.2d 529, 549 (D.Vi. 1998). The bill also does not require that only "peer" reviewed or published information be considered nor does it require that the FWS or NMFS conduct new studies or await the completion of new studies and analysis. *See California Native Plant Soc'y* v. *Norton*, 2004 WL 1118537 (S.D. Cal. Feb. 10, 2004). This bill merely requires that the FWS and NMFS take the "best scientific and commercial data available" supporting their decision scan it onto the Internet. If litigation is filed related to the listing or critical habitat decision, this data has to be produced for the administrative record anyway. H.R. 4315 does nothing to change that. This bill is not a radical change to the ESA.

H.R. 4316 similarly only adds a requirement for reporting of data that should already be available. This bill requires a report on attorney's fees and costs for ESA-related litigation. Again, this bill does not change the citizen suit provision of the ESA to add or subtract the amount or type of litigation that can be filed; this bill does not take away any of the Department of Justice's authority or ability to settle litigation at any point, this bill does not bypass the "existing legal safeguards" ensuring that the Federal Government follows its procedural and legal mandates, including ensuring that deadlines are met. *See* Testimony of Robert V. Percival, Before the House Committee on Oversight and Government Reform, Hearing on "Mandate Madness: When Sue and Settle Just Isn't Enough," June 28, 2012. In his testimony, Professor Percival opines that the citizen suit and Administrative Procedures Act ("APA") waivers of sovereign immunity to allow litigation against the Federal agencies are "desirable and favored by public policy," and that "existing legal safeguards preclude collusive litigation." H.R. 4316 does nothing to dispute or change any of those arguments. The bill simply requires reporting of existing litigation and attorney's fees payments to the public. It should not be a radical notion for the public to know how much is being paid by the Federal Government and to whom the check is written.

H.R. 4317 is equally benign. This bill states that the FWS and NMFS must cooperate and consult with State agencies with regard to the data that the Federal Government considers, and that ESA listing decisionmakers consider data submitted by State and local governments and Indian tribes. State and local governments and Indian tribes have significant interest and expertise in protecting plant and animal species and habitats, particularly given that they have local conservation district managers, State game management agencies, and tribal government resources to use for this task. It seems exceedingly arrogant for the Federal Government to not want to coordinate with these local experts. Other Federal statutes, such as the National Environmental Policy Act, require coordination and consultation with State and local governments and Indian Tribes; the ESA should be no different and Federal biologists should take advantage of this important local knowledge.

As with H.R. 4315, H.R. 4317 does not define "best scientific and commercial data available" nor does it require the FWS of NMFS to wait until the State or local

government or Indian tribe develops independent data. The terms "cooperate" and "consult" do not give State and local governments or Indian tribes any type of "veto power" over the Federal agencies nor do these terms regulate the requirements of the ESA to a subservient position with regard to State, local and tribal interests. The Federal cases that define "cooperate" cite to the dictionary definition of the term from the Webster's New International Dictionary which defines the term as "to work together." *See Long Term Capital Holdings* v. *United States*, 330 F.Supp.2d 122, 168 (D. Conn. 2004) *aff'd sub nom. Long-Term Capital Holdings, LP* v. *United States*, 150 F.App'x 40 (2d Cir. 2005).

The Federal courts define "consult" by stating:

> *Merriam-Webster's Collegiate Dictionary* defines "consultation" as "the act of consulting or conferring," and it defines "consult" as "to deliberate together," among other things. *See Merriam-Webster's Collegiate Dictionary 268* (11th ed. 2005). *The American Heritage Dictionary of the English Language* similarly defines "consultation" as "[t]he act or procedure of consulting" and defines "consult" as "[t]o seek advice or information of" or "[t]o have regard for; consider." *The American Heritage Dictionary of the English Language 286* (1978).
>
> *Makua* v. *Gates*, 2008 WL 976919 (D. Haw. Apr. 9, 2008) *order clarified*, 2009 WL 196206 (D. Haw. Jan. 23, 2009).

Consulting and cooperating with State governments, local governments and Indian tribes does not change the mandates or substance of the ESA, but it ensures that all data and information is available to the FWS and NMFS so that they can make the best decision they can.

Finally, H.R. 4318 caps the hourly fee that attorneys can charge for ESA litigation filed pursuant to the ESA citizens suit provision at the same rate as the hourly fee allowed under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412(D)(2)(a)(ii). Although the citizens suit provision waives sovereign immunity for ESA litigation related to alleged violations of ESA section 4 (cases related to species listing, critical habitat designation, development of recovery plans and special rules), litigation filed against the Federal Government related to other ESA provisions are not subject to the citizens suit provision. For example, a substantial amount of litigation related to the ESA stems from charges that the Federal Government is violating the section 7 consultation requirements of the ESA. 16 U.S.C. 1536(a)(2). Sovereign immunity for those suits is waived pursuant to the Administrative Procedures Act ("APA"); attorney's fees for cases brought pursuant to the APA are paid under the EAJA. EAJA statutorily sets the attorney's fees cap at $125 per hour. If the purpose of litigation enforcing the ESA is truly species protection driven, is seems very inequitable for attorneys litigating ESA section 4 cases to receive "unlimited" hourly fees, although those attorneys litigating the equally important ESA section 7 consultation provisions only receive $125 per hour. This bill would not stop litigation, change any of the causes of action possible under either the ESA citizens suit provision or the APA enforcing the provisions of ESA section 7; it just treats all ESA plaintiffs' counsel equally.

The concern that litigation, rather than biology or science, would overtake the ESA is nothing new. In fact, settlement agreements like the multi-district settlement agreements in 2011 are not new. In *Re: Endangered Species Act Section 4 Deadline* Limitation, Misc. Action No. 10–377 (EGS), MDL Docket No. 2165. Just over 10 years ago, the Clinton administration's U.S. Fish and Wildlife Service issued its Final Listing Priority Guidance because, even at that time, pending and threatened litigation was "diverting considerable resources away from the Service's efforts to conserve endangered species." *See* Notice of Listing Priority Guidance, 61 FR 24722–02, 24724 (May 16, 1996). That notice was published because the Service wanted to publically announce that it would not "elevate the priority of proposed listings simply because they are the subjects of active litigation. To do so would let litigants, rather than expert biological judgment, control the setting of listing priorities." *Id.* at 24728.

The publication of that guidance was based upon a 1992 Clinton negotiated settlement agreement with Plaintiffs Fund for Animals and Defenders of Wildlife that required the FWS to resolve the conservation status of 443 candidate species by publication of a proposed listing or a notice stating why listing was not warranted.[1] *Fund for Animals et al* v. *Babbitt*, 92–cv–800 (D.D.C. April 2, 1992). The complaint was never answered by the Justice Department. Rather a settlement agreement was

[1] This is exactly the same requirement as the current Center for Biological Diversity and WildEarth Guardians multi-species settlement agreements, although the current multi-species settlement includes 1053 ESA actions.

negotiated, and attorney's fees of $67,500 were paid. In 1996, the Fund for Animals revived the same litigation to seek a court ordered compliance with the original settlement agreement because the FWS could not keep up with the ambitious decision-making schedule. *Fund for Animals et al* v. *Babbitt*, 92–cv–800 (Motion filed by Plaintiffs enforcing the settlement agreement, docket 19 (August 19, 1996)). Again, no answer was filed by the Justice Department, but a new schedule for the remaining decisions was negotiated and another $24,500 was paid in attorney's fees. It was then that the U.S. Fish and Wildlife Service issued its Final Listing Priority Guidance to ensure that the work of agency's biologists would not be driven by litigation. *See* 61 FR 24722–02, 24728 (stating that "The Service will not elevate the priority of proposed listings for species simply because they are subjects of active litigation. To do so would let litigants, rather than expert biological judgments, control the setting of listing priorities. The Regional Office with responsibility for processing such packages will need to determine the relative priority of such cases based upon this guidance and the 1983 listing priority guidance and furnish supporting documentation that can be submitted to the relevant Court to indicate where such species fall in the overall priority scheme.")

The events leading up to the 1996 Listing Priority Guidance Federal Register notice are eerily similar to the 2011 multi-species Obama settlement agreement with the Center for Biological Diversity and WildEarth Guardians. The litigation in both cases was filed by environmental groups who were not satisfied with the pace of decisions issued by the FWS or NMFS. Rather than answering the litigation, the Justice Department entered into settlement agreements committing the Federal agencies to strict time deadlines for making decisions that either list species or determine that listing is not warranted. Decisions to place the species on the "warranted but precluded" or on the candidate list are not allowed under either the 1992 or 2011 settlement agreements. Between the settlement agreement in 1992 and the motion to force compliance with the settlement agreement in 1996, the FWS determined, on its own, that it could not comply with the settlement time schedule and its regular workload. 61 FR 24726 (noting that if the Service were to devote its budget to compliance with the settlement agreement, it would be devoting no resources to the final listing decisions of the 243 species that were proposed for listing at the time. "This course of action would also result in a still larger backlog of proposed species awaiting final decision.").

Still other FWS notices decry the concern over the immense amount of ESA litigation. For example, in the proposed rules listing the Spalding's Catchfly (plant) as threatened, the Service stated that because of "litigation demands" even though the petition to list was presented on November 16, 1998, action was not taken until December 3, 1999. 64 FR 67814–02 (December 3, 1999). The plant was not finally listed as threatened until October 10, 2001. 66 FR 51598–01 (October 10, 2001) (again citing litigation demands as one of the reasons for the delay). Even as recently as 2010, the Service noted that "resource demands associated with litigation" delayed the finalization of the draft recovery plan for the bull trout. 75 FR 2270–01 (January 14, 2010). Any claim that the current pace of litigation does not impact implementation of the ESA is simply not borne out by the FWS' own documents.

Recently, there have also been claims that ESA litigation costs are "not a concern under the Endangered Species Act." *See* Center for Biological Diversity ("CBD") March 29, 2014. In support of its claim, the CBD cites two studies that it simply did not read. First the August, 2011 Governmental Accountability Office ("GAO") study entitled "Environmental Litigation Cases Against EPA [Environmental Protection Agency] and Associated Costs over Time" shows a dramatic increase in litigation against the EPA from 2009 to 2010. Because the EPA does not administer the ESA, it is not a surprise that ESA litigation against the agency is limited. The two ESA cases reported against the EPA dealt with claims that the EPA had failed to comply with the section 7 consultation requirements of the ESA. One environmental group, Northwest Environmental Defense Center, was paid $40,000 in 2010; the CBD was paid $405,000 for its section 7 consultation case against the EPA in 2007. Because these cases involved ESA section 7 claims, the attorney's fees were paid based upon the Equal Access to Justice Act. Additionally, the 2011 GAO report complained, "Justice [Department] maintains separate, decentralized databases containing environmental case litigation and does not have a standard approach for collecting and entering data. Without a standard approach, it is difficult to identify and summarize the full set of environmental litigation cases and costs managed by the department agency wide."

The second GAO study cited by the CBD, "USDA Litigation, Limited Data Available of USDA Attorney Fee Claims and Payments," March 26, 2014 also does not support the CBD's claims. That study noted that there is no central internal or external tacking of attorney fee payments within the Department of Agriculture

("USDA"). With regard to ESA litigation, again because the Department of Agriculture does not implement the listing and critical habitat provisions of the ESA, litigation relates to alleged violations of the ESA section 7 consultation provisions. Of the 33 USDA agencies, 29 do not track attorney's fees payments at all, even though some of those agencies have been sued for alleged violation of ESA section 7 consultation requirements. *See, e.g., Buffalo River Watershed Alliance et al* v. *United States Department of Agriculture et al*, 13–cv–450 (E.D. Ark, August 6, 2013) (claiming that a loan decision backed by the USDA's Farm Services Agency[2] and the Small Business Administration violated the section 7 consultation provisions of the ESA). Clearly this report cannot be said to support the proposition that ESA litigation is "not a concern."

The CBD press release, dated March 26, 2014, fares no better. This press release was based on a 276 page spread sheet run released by the Department of Justice ("DOJ") listing litigation summaries in cases defended by the Environment and Natural Resources Division, Wildlife Section of DOJ. The spread sheets are titled "Endangered Species Defensive Cases Active at some point during FY09–FY12 (through April 4, 2012)". Although the DOJ release itself contained no analysis, my legal staff calculated the following statistics:

Total Number of Cases Filed	573
Total Number of Cases in which Attorney's Fees were Paid	183
Total Cases Filed by Environmental Group	489
Total Cases Filed by Industry Group, Local Government or Water District	19
Number of filed by Individuals Who Did Not Seem to be Tied to any Group	65
Total Attorney's Fees Paid	$52,518,628.93

And while the payment of $52,518,628.93 of American taxpayer's money over an approximate 3-year period seems high, use of the FOIA has shown that the DOJ does not keep an accurate account of the cases it defends. For example, in 2009, my firm sent a FOIA request to the DOJ asking for the amount of litigation defended and attorney's fees paid to a named environmental group based upon litigation against the Federal Government filed in the Federal District Court for the District of Idaho. The Justice Department responded with what it believed were all cases that met the criteria, a total of 67 cases in all. Reviewing those cases, according to the Justice Department's list, this environmental group received approximately $900,000 in attorney's fees in 9 years. However, when the list provided by the Justice Department was compared with the actual PACER documents from the Federal District Court of Idaho, it was discovered that the Department failed to account for an additional 23 cases filed by this single group in the District Court in Idaho. We also discovered that this single group had received $1,150,528 in tax payer dollars over the applicable period. This is just one illustration that shows that the DOJ run sheets attached to the 2014 CBD press release do not account for all the litigation filed or the attorney's fees paid.

I would thank this committee for holding this hearing and for starting the discussion related to the ESA. The FWS Web site, as of April 5, 2014, shows that 1337 species have been listed, but only 30 recovered. While the advocates can argue about whether the Act is working, these bills at least make the decisions more apparent and transparent to the American public and the bill-paying taxpayers.

Thank you.

Mrs. LUMMIS. I thank the witness, and wish to recognize Mr. Robert Percival for 5 minutes. Thank you for being here.

[2] The Farm Services Agency is one of the USDA agencies that does not track attorney's fees payments.

STATEMENT OF ROBERT V. PERCIVAL, ROBERT F. STANTON PROFESSOR OF LAW, DIRECTOR, ENVIRONMENTAL LAW PROGRAM, UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, BALTIMORE, MARYLAND

Mr. PERCIVAL. Thank you, Madam Chair. I have a bit of a cold, but I am the Director of the Environmental Law Program at the University of Maryland School of Law.

The Endangered Species Act is the product of a remarkable bipartisan consensus concerning the moral imperative of preserving biodiversity. I remind the committee that it was approved by Congress overwhelmingly by a 92-to-0 vote in the Senate, and with only 12 dissenting votes in the House. The ESA has been recognized as one of the most profound moral accomplishments of the human race, because it recognizes that we have an ethical obligation to preserve all of God's creation.

The U.S. Supreme Court, in its first decision, interpreted the Act—called it the most comprehensive legislation for the preservation of endangered species ever enacted by any nation, and it emphasized the importance of citizen involvement provided by the Act with respect to petitioning to list species, and also the citizen suit provisions of the Act.

One chronic problem with implementation of the Act, though, is that the agencies have not been given sufficient appropriations to carry out all their statutory duties, and that is a large reason why they have been subjected to so many lawsuits.

I do want to make one correction to Ms. Budd-Falen's testimony. She refers in it to a 1992 Clinton administration-negotiated settlement with the Fund for Animals and Defenders of Wildlife that required the Fish and Wildlife Service to resolve the conservation status of 443 candidate species, and she cites the case as having the settlement agreement approved on April 2, 1992. I would remind her that President Clinton was not elected President until November 1992, and did not take office until January 1993. That indeed was the settlement negotiated by the Bush administration, which I think makes my point that this has been a chronic problem with respect to implementation of the Act under both Republican and Democratic administrations.

Now, the legislative proposals we have before us today would only exacerbate this problem by imposing new, unfunded mandates on the agencies. Until Congress provides adequate funding to enable the agencies to discharge in a timely fashion their responsibilities for listing endangered species, consulting with other Federal agencies concerning their conservation, obligations for listing species, and for promoting species recovery acts, the current pattern of litigation is likely to continue.

Three of the four bills under consideration at this hearing would create new statutory responsibilities for the agencies implementing the ESA without increasing the already inadequate funds made available to them. The fourth would change the standard for awarding attorney's fees under the Act. The ability of citizen groups and businesses to go to court to hold agencies accountable has been one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our Federal environmental laws are implemented

and enforced in a manner consistent with statutory directives, as the Supreme Court noted in its landmark *TVA* v. *Hill* decision.

The citizen suit provision currently in Section 11(g) of the Endangered Species Act mirrors those provisions contained in virtually all the other major Federal environmental laws. There is no warrant for singling out the Endangered Species Act and cutting back on the possibility of attorney's fees, just because some don't like litigation, which occurs in both Republican and Democratic administrations.

The ESA is a landmark piece of legislation that was the product of an overwhelming bipartisan consensus concerning the importance of preserving biodiversity. Congress authorized citizen suits to hold agencies accountable for violations of the Act. Measures to oppose additional unfunded mandates on agencies implementing the ESA will only make it more difficult for them to carry out their statutory responsibilities. There is certainly no justification for singling out the ESA's attorney's fee-shifting provision that currently mirrors those contained in virtually every other major Federal environmental law. Thank you.

[The prepared statement of Mr. Percival follows:]

PREPARED STATEMENT OF ROBERT V. PERCIVAL, ROBERT F. STANTON PROFESSOR OF LAW, DIRECTOR, ENVIRONMENTAL LAW PROGRAM, UNIVERSITY OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW, BALTIMORE, MARYLAND ON H.R. 4316 AND H.R. 4318

My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. For more than two decades I have been the principal author of the most widely used environmental law casebook in U.S. law schools, *Environmental Regulation: Law, Science & Policy* (Wolters Kluwer Law & Business, 7th ed. 2013). I have taught Environmental Law for more than a quarter century and I also teach Constitutional Law, Administrative Law and Global Environmental Law.

I. THE ENDANGERED SPECIES ACT REFLECTS OUR HIGHEST MORAL ASPIRATIONS

The Endangered Species Act (ESA) is the product of a remarkable, bipartisan consensus concerning the moral imperative of preserving biodiversity. In his Special Message to Congress on February 8, 1972, President Richard Nixon called on Congress to enact "legislation to provide for early identification and protection of endangered species," to "make the taking of endangered species a Federal offence for the first time," and to "permit protective measures to be undertaken before a species is so depleted that regeneration is difficult or impossible."[1] Congress responded by enacting the ESA by an overwhelming, bipartisan majority. The legislation passed the Senate by a vote of 92–0 on July 24, 1973. On September 18, 1973, the House approved its own version of the bill by a vote of 390–12. The final legislation that emerged from a joint conference committee was agreed to by the Senate unanimously on December 19, 1973 and by the House by a vote of 355–4 on December 20, 1973. President Nixon signed the ESA into law on December 28, 1973.

The ESA is a profoundly "pro-life" piece of legislation. It creates a presumption that humans should avoid activity that would harm endangered species and that Federal agencies should avoid actions likely to jeopardize species continued existence. The ESA has been recognized as one of the most profound moral accomplishments of the human race because it recognizes that we have an ethical obligation to preserve all of God's creation.[2]

---

[1] Richard M. Nixon, Special Message to Congress Outlining the 1972 Environmental Program, Feb. 8, 1972 (http://www.presidency.ucsb.edu/ws/index.php?pid=3731).

[2] Roderick F. Nash, The Rights of Nature: A History of Environmental Ethics (Univ. Wisc. Press 1989). See also Evangelical Environmental Network, On the Care of Creation: An Evangelical Declaration on the Care of Creation (1994) (http://www.earthcareonline.org/evangelical_declaration.pdf).

In its first major decision interpreting the ESA, the U.S. Supreme Court declared the Act to be "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[3] It explained that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities."[4] As an illustration of "the seriousness with which Congress viewed this issue," the Court specifically cited the ESA's "provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in United States district courts to force compliance with any provision of the Act."[5]

Despite strong public support for the ESA,[6] it often has been a target for political attacks because the costs of species protection measures are more visible and immediate than the more diffuse, long-term benefits of preserving biodiversity. Yet the bipartisan majority that enacted this landmark legislation rejected the notion that species should be sacrificed to political expediency. As the Supreme Court explained in *TVA* v. *Hill* "Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet."[7] Thus "the plain intent of Congress in enacting" the legislation "was to halt and reverse the trend toward species extinction, whatever the cost."[8]

Balanced, scientific evaluations of the ESA have consistently endorsed its basic principles. Evaluating more than two decades of experience with the ESA, the National Research Council in 1995, in a report commissioned by Congress, found that "the ESA is based on sound scientific principles."[9] It concluded that "there is no doubt that it has prevented the extinction of some species and slowed the decline of others."[10] In a letter to the U.S. Senate in March 2006 a group of 5,738 biologists praised the ESA and criticized proposals to weaken its protections. The biologists noted that the ESA had contributed to "significant progress" in species protection. They stressed the importance of the ESA's emphasis on "best available science" and they criticized proposals to mandate the use of non-scientific factors to delay or block listing decisions, designations of critical habitat or implementation of species recovery plans.[11]

II. INADEQUATE FUNDING HAS JEOPARDIZED IMPLEMENTATION OF THE ESA. IMPOSITION OF ADDITIONAL UNFUNDED MANDATES ON AGENCIES WOULD ONLY EXACERBATE THIS PROBLEM.

A fundamental problem with implementation of the ESA has been the chronically inadequate funding that has been afforded the Federal agencies charged with implementing the Act. Since it was last reauthorized in 1992, the ESA has been implemented through annual appropriations that have been inadequate to enable the agencies promptly to comply with their statutory responsibilities.[12] This has made the agencies targets for lawsuits seeking to compel them to perform their nondiscretionary duties. Until Congress provides adequate funding to enable Federal agencies to discharge in a timely fashion their responsibilities for listing endangered species, for consulting with other Federal agencies concerning their conservation obligations for listed species, and for promoting species recovery efforts, the current pattern of litigation is likely to continue.

The imposition of additional unfunded mandates on the agencies would only exacerbate existing problems of inadequate agency resources. Three of the four bills under consideration at this hearing would create new statutory responsibilities for the agencies implementing the ESA without increasing the already-inadequate funds available to them.

---

[3] Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).
[4] Id. at 194 (1978).
[5] Id. at 181.
[6] During the spotted owl controversy in 1992, voters supported the ESA by a margin of 66 to 11 percent. When asked to choose between protecting species or savings jobs and businesses, species protection was favored by a margin of 48 to 29 percent. Sawhill, Saving Endangered Species Doesn't Endanger the Economy, Wall. St. J., Feb. 20, 1992, at A15.
[7] 437 U.S. at 178–79.
[8] Id. at 184.
[9] National Research Council, Science and the Endangered Species Act 4 (1995).
[10] Id.
[11] Letter from 5,738 Biologists to the U.S. Senate Concerning Science in the Endangered Species Act, March 2006 (http://www.ucsusa.org/assets/documents/scientific_integrity/biologists_california.pdf).
[12] Donald C. Baur, Michael J. Bean & William Robert Irvin, A Recovery Plan for the Endangered Species Act, 39 Envt'l L. Rep. 10006, 10010 (2009).

H.R. 4315 would require publication on the Internet of the basis for determinations that species are endangered and threatened. This is unnecessary given the agencies' existing statutory obligation under the ESA and the Administrative Procedure Act (APA) to provide public notice of proposed and final agency actions in the Federal Register, which is available on the internet, and to describe and evaluate the reasons and data upon which agency actions are based.[13]

H.R. 4316 would require the Secretary of Interior annually, in consultation with the Secretary of Commerce, to gather and to submit to Congress detailed data concerning not only every citizen suit brought under the ESA, but also every notice letter informing the agency of an alleged violation of the Act. This data would include not only direct expenditures by the agencies on any aspect of preparation for, or conduct of such litigation, but also estimates of employee time devoted to such activities. The bill targets only citizen suits and does not require reporting of the costs of responding to oversight requests by congressional committees, which have been quite substantial.[14] By focusing solely on the costs of performing agency duties under the ESA, without any consideration of the benefits of such actions, this data would contribute to a distorted view of the value of the ESA.

H.R. 4317 would dictate that the "best scientific and commercial data available" include "all such data submitted by a State, tribal, or county government." If this is interpreted to mean that any data submitted by such a government must be deemed to be the "best scientific and commercial data available," the requirement would constitute an improper effort by Congress to dictate scientific judgments. If instead it means only that when governments submit scientific and commercial data that is indeed the best available, it is unnecessary because this is already permissible under existing law.

III. CONGRESS SHOULD NOT AMEND THE ATTORNEY FEE-SHIFTING PROVISIONS OF THE ESA

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our Federal environmental laws are implemented and enforced in a manner consistent with statutory directives, as the Supreme Court noted in its landmark *TVA* v. *Hill* decision.[15]

The citizen suit provision contained in Section 11(g) of the Endangered Species Act[16] mirrors those contained in the other major Federal environmental statutes.[17] It authorizes the court to "award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."[18] In *Ruckelshaus* v. *Sierra Club*,[19] the Supreme Court interpreted similar language in the citizen suit provision of the Clean Air Act to require success on the merits before a party can become eligible for an award of attorney's fees.

The attorney fee-shifting provisions Congress has enacted in nearly all the Federal environmental laws are designed to enable ordinary citizens to ensure that the laws are implemented and enforced.[20] Despite claims to the contrary, citizen suits have proven to be essential to effective implementation of the ESA[21] and the other

---

[13] See ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B) ("the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.") and ESA § 4(b)(4), 16 U.S.C. § 1553(b)(4) (mandating that the informal rulemaking provisions of the APA, 5 U.S.C. § 553, apply to regulations issued under the ESA), and ESA § 4(b)(8) (requiring that publication in the Federal Register of any listing regulation "shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation.").

[14] See Letter from Secretary of Interior Sally Jewell to Chairman Hastings, January 15, 2014 (http://www.eenews.net/assets/2014/01/16/document_daily_04.pdf) (estimating that the Department of Interior spent more than 19,000 staff hours and nearly $1.5 million responding to 27 document requests from this committee).

[15] 437 U.S. 153, 181 (citing the ESA's "provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in U.S. district courts to force compliance with any provision of the Act.")

[16] 16 U.S.C. § 1540(g).

[17] See generally, Congressional Research Service, Award of Attorneys' Fees by Federal Courts and Federal Agencies, June 20, 2008.

[18] 16 U.S.C. § 1540(g)(4).

[19] 463 U.S. 680 (1983).

[20] Robert V. Percival & Geoffrey P. Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," 47 Law & Cont. Problems 235 (1984), available online at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3755&context=lcp.

[21] Laura Peterson, Lawsuits Not Hurting Endangered Species Act—FWS Director, Greenwire, July 5, 2012; Berry Bosi & Eric Biber, Citizen Involvement in the U.S. Endangered Species Act, 337 Science 802 (Aug. 2012).

major Federal environmental statutes. Thus, there is no justification for measures to discourage such actions.

H.R. 4318 would replace the existing standard for awarding attorney's fees under the ESA with a more restrictive standard contained in the Equal Access to Justice Act (EAJA). Rather than allowing judges to award "reasonable" fees to prevailing parties when "appropriate," as authorized under existing law, this amendment would single out ESA citizen suits and subject them to below-market fee caps under the EAJA. There is no justification for removing citizen suits brought under the ESA from the same fee-shifting standards applicable to the other major Federal environmental laws. As noted above, *Ruckelshaus* v. *Sierra Club* already restricts attorney's fee awards to prevailing parties. Thus, H.R. 4318 is merely a measure designed to make it more difficult for citizens to hold government agencies accountable for failing to implement the ESA.

IV. CONCLUSION

The ESA is a landmark piece of legislation that was the product of an overwhelming, bipartisan consensus concerning the importance of preserving biodiversity. Congress authorized citizen suits to hold agencies accountable for violations of the Act. Measures to impose additional unfunded mandates on agencies implementing the ESA will only make it more difficult for them to carry out their statutory responsibilities. There is no justification for replacing the ESA's attorney's fee-shifting provision that currently mirrors those contained in virtually every other major Federal environmental law.

Mrs. LUMMIS. I thank the gentleman, and I now recognize Mr. Ken Holsinger of Denver, Colorado. Thank you for being here.

STATEMENT OF KENT HOLSINGER, ATTORNEY, HOLSINGER LAW, DENVER, COLORADO

Mr. HOLSINGER. Thank you, Madam Chair, members of the committee. It is my honor to be here to testify in support of H.R. 4316, the "Endangered Species Recovery Transparency Act," and H.R. 4318, the "Endangered Species Litigation Reasonableness Act."

As the manager of a small Denver-based law firm that specializes in lands, wildlife, and water law, I can attest to the rampant litigation abuses that have been perpetrated under the Endangered Species Act. Last year was the 40th anniversary of the Act. It has been amended in 1978, 1982, and, last, in 1988. Now, to put that in perspective, in 1988 the Soviet Union was a superpower, and Def Leppard topped the pop charts. It is high time to modernize and update this law.

Like none other, litigation drives the ESA. And, unfortunately, a few activist groups have buried the U.S. Fish and Wildlife Service in petitions and litigation. The Center for Biological Diversity and Wild Earth Guardians in particular have petitioned to list hundreds and hundreds of species. And when the Fish and Wildlife is overwhelmed in trying to respond, these groups are litigating against missed deadlines. They are creating the very problems they are suing over.

For example, Wild Earth Guardians, formerly known as Forest Guardians, and Center for Biological Diversity have been litigants in no fewer than 1,366 cases between 1990 and the present: Wild Earth Guardians in 401 cases, Center for Biological Diversity in 965.

Now, looking closely at the Wild Earth Guardians cases, most have been brought against the Federal Government, about 95 per-

cent. Most have been against the Department of the Interior, and most have been on ESA issues.

Center for Biological Diversity, you can see, has filed most of their cases in the 9th Circuit Court of Appeals. This is, by the way, a chart showing, by each U.S. district court, cases filed by Center for Biological Diversity. We got this information through the Public Access to Court Electronic Records, or PACER, and searched each and every Federal jurisdiction to find where Center for Biological Diversity and Wild Earth Guardians had filed suit.

We also searched the appellate courts and the number of cases. You can see a huge preference for the 9th Circuit Court of Appeals, the most overturned circuit in the Nation. And if you tally these 965 cases brought by CBD, about two-thirds were in the 9th Circuit and the District of Columbia.

Wild Earth Guardians, in the next slide, a little bit different. You can see many cases filed where they are based in New Mexico, of their total of 403 cases filed.

In 2011, as you know, Wild Earth Guardians and CBD entered a significant settlement agreement with Fish and Wildlife Service, auspiciously to help prevent litigation and stem this vicious sue-and-settle cycle. Unfortunately, since then, CBD has still been a party to 179 lawsuits, Wild Earth Guardians, 88.

These actions are robbing the species to pay the attorneys. And as long as 10 years ago the Fish and Wildlife Service itself recognized, in discussing litigation over critical habitat, it provides little real conservation benefit. "Driven by litigation in the courts, rather than biology, it limits our ability to fully evaluate the science, consumes enormous agency resources, and imposes huge societal and economic costs." That quote is more apropos today than ever.

H.R. 4316 and H.R. 4318 would do much to improve the ESA, and make sure that resources are used where they belong. Let's use our scarce conservation resources wisely, rather than on this frivolous and needless litigation.

Madam Chair, thank you again for the opportunity to testify in support of these measures. We have seen a windfall to the attorneys in these few activist groups, and it is high time that Congress address these issues, update and modernize the ESA for the betterment of people, wildlife, and the communities that depend upon them. Thank you.

[The prepared statement of Mr. Holsinger follows:]

PREPARED STATEMENT OF KENT HOLSINGER, ATTORNEY, HOLSINGER LAW, LLC, DENVER, COLORADO ON H.R. 4316 AND H.R. 4318

Thank you for the opportunity to testify in support of H.R. 4316 (the Endangered Species Recovery Transparency Act) and H.R. 4318 (the Endangered Species Litigation Reasonableness Act). Holsinger Law, LLC is a small, Denver-based law firm that specializes in lands, wildlife and water law. I am testifying as the manager of Holsinger Law, LLC. In that capacity, I can attest to the rampant litigation abuses under the Endangered Species Act ("ESA") and the need for H.R. 4316 and H.R. 4318. These measures would improve and update the ESA while ensuring scarce conservation resources go to real, on-the-ground work rather than taxpayer-funded litigation.

I. THE ENDANGERED SPECIES ACT SHOULD BE UPDATED

Last year was the 40th anniversary of the ESA. The ESA is the most powerful environmental law in the world. The end product of nearly a century of Federal encroachment on State authority and control over wildlife, it was passed by the Con-

gress and signed by President Nixon in 1973. The ESA replaced 1966 and 1969 laws which provided for the listing of endangered species but with little substance. The 1973 Act has been reauthorized eight times. Significant amendments have been enacted in 1978, 1982, and 1988, while the overall framework of the 1973 Act has remained essentially unchanged.

Former Idaho Senator Dirk Kempthorne tried, but ultimately failed, to amend and reauthorize the ESA in 1997. I was intimately involved in those efforts as well as the amendments to the ESA that passed the House in October, 2005 under the leadership of former House Resources Committee Chairman Richard Pombo. Unfortunately, the Senate never adopted similar legislation. The last time the ESA was updated (1988), the Soviet Union was a superpower and Def Leppard topped the pop charts.

II. LITIGATION ABUSES

Like no other law, litigation drives the ESA. Unfortunately, a few activist groups have buried the U.S. Fish and Wildlife Service ("FWS") with listing petitions and litigation under the ESA. The Center for Biological Diversity ("CBD") and WildEarth Guardians ("WEG") have petitioned to list hundreds and hundreds of species under the ESA. As soon as the FWS is overwhelmed responding to petitions, these groups start litigating over missed deadlines. They are creating the very problems upon which they are suing the FWS.

CBD and WEG[1] have been litigants in no fewer than 1,366 cases between 1990 and the present. WEG was involved in 401 cases while CBD was a party to 965 cases. Of the WEG cases, approximately 95 percent have been brought against the Federal Government. In 2010, WEG filed more than one new lawsuit per week. Most of these have been brought against the U.S. Department of the Interior (DOI), and most have raised claims related to the ESA. In just the past 5 months, these two groups have been a party to an additional 19 cases.

We compiled this information using the Public Access to the Court Electronic Records ("PACER") system and performing a query for "WildEarth Guardians" and "Center for Biological Diversity" as a party in each of the Federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER "National Case Locator" function was utilized to search for cases in which WEG or CBD were a party that were filed between November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

Responding to litigation-driven settlement agreements has consumed the FWS and a significant part of its budget. Activist groups often collect taxpayer-funded attorney fees when new deadlines are negotiated in these cases—perpetuating a vicious "sue and settle" cycle.

In the summer of 2011, WEG and CBD announced a settlement agreement with the FWS that imposed deadlines for final determinations for listed status on 757 species no later than September, 2016. The Plaintiffs collected over $140,000 in attorney fees and costs from the taxpayers as part of the settlements. Since the settlements, CBD has been a party to approximately 179 lawsuits and WEG has participated in 88 lawsuits.

On March 17, 2014, the State of Oklahoma ("Oklahoma"), along with the Domestic Energy Producers Alliance ("DEPA"), filed suit against the FWS citing the use of "sue-and-settle" tactics. Additionally the settlements require the FWS to submit either a "warranted" or "not warranted" decision, effectively eliminating the "warranted but precluded" category. Scott Pruitt, Oklahoma Attorney General, also stated that the "sue and settle" timelines force decisions from the FWS before they have had a chance to review the science, which violates the original structure of the ESA requiring sound science before a listing determination is made. Overall, the parties argued that FWS has deviated from the ESA requirements and the guidance FWS adopted thereunder by committing to these unrealistic deadlines; and that this action undermines support for State-led voluntary conservation programs of other species.

Despite the settlement agreements, CBD has boasted of filing new ESA petitions (including one emergency petition) and lawsuits as recently as April 3, 2014, with 15 press releases announcing notices of intent to sue, lawsuits filed, and lawsuits joined since the beginning of the year.

---

[1] Formerly known as Forest Guardians.

III. ROBBING THE SPECIES TO PAY THE ATTORNEYS

Congress passed the Endangered Species Act with visions of protecting grizzly bears and bald eagles from reckless human-caused extinction. Few could have foreseen how all-out protective efforts on behalf of such little-known creatures as the burying beetle, the pallid sturgeon, or the Preble's meadow jumping mouse would adversely impact U.S. taxpayers due to rampant litigation abuses in which millions of dollars of taxpayer funds are used to prepare, litigate, and settle lawsuits brought by just a few activist groups.

This abusive litigation does little to further conservation of species. It does much to pad the pocketbooks of a few litigious groups and their attorneys. The Center for Biological Diversity ("CBD") posted an astonishing $1,406,139 in legal returns in 2012 (17 percent of that year's total revenue) and $503,509 in 2011. In WEG's 2011 Financial Report, they stated $303,406 in legal income—accounting for 16 percent of their total income for the year. 2010 brought them $153,545 in legal income.

Even the FWS has recognized the huge social and economic cost of such activist litigation. In discussing critical habitat, the FWS has stated it:

> . . . provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic cost. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.. . .[2]

IV. H.R. 4316 AND H.R. 4318 WILL IMPROVE THE ESA

Currently, no one seems to know exactly how destructive this litigation is. H.R. 4316, The Endangered Species Recovery Transparency Act, introduced by Rep. Lummis, would require the FWS to report the resources used to respond to ESA litigation, including the number of employees needed, the funds used, and the attorney's fees awarded due to litigation and settlement agreements. This information is vital to determine how taxpayer dollars are being consumed by attorneys rather than being used to support real conservation work. By reviewing this information, steps can be taken to direct funds where they will more effectively promote the conservation and recovery of endangered or threatened species, and to also support boot-on-the-ground conservation efforts at the local level.

As an attorney in private practice, I have seen environmental groups claim excessive hourly rates in litigation. It is not uncommon to see claims for more than $500 per hour. H.R. 4318, The Endangered Species Litigation Reasonableness Act, introduced by Rep. Huizenga, would place a cap on attorney fees that can be awarded by the courts. Litigation abuses result in excessive pay-outs of taxpayer funds. A cap limiting the hourly rate for prevailing attorneys would diminish the incentive to "sue and settle" by activist groups, but more importantly, allow taxpayer dollars to be more effectively allocated to the conservation and recovery of species.

I strongly support the passage of these measures to improve the ESA and urge the committee to advance them in the legislative process.

V. CONCLUSION

Now is hardly the time for "business as usual" under the ESA. Scarce resources are being wasted on litigation driven by a handful of activist groups with little or no real conservation benefits. People and wildlife would benefit from improvements to the ESA, through enactment of H.R. 4316 and H.R. 4318. I urge Congress and the administration to work together to reduce frivolous litigation through disclosure of costs to the taxpayers and a reasonable cap on the hourly rate for awards of attorney fees. It is high time to stop wasting taxpayer dollars and rewarding frivolous and abusive litigation.

Thank you again for the opportunity to testify on these important measures.

---

[2] 69 FR 53135 (Aug. 31, 2004).

Exhibit A
to
Kent Holsinger Testimony
April 8, 2014

Center for Biological Diversity Litigation 1990 – Present

This table summarizes the number of cases in U.S. Federal Court system in which the Center for Biological Diversity has been a party.

Alabama	2	Louisiana	10	Oklahoma	0	Fed. Claims Court	0
Alaska	31	Maine	2	Oregon	21	1st Circuit	1
Arizona	3	Maryland	0	Pennsylvania	0	2nd Circuit	2
Arkansas	0	Massachusetts	2	Puerto Rico	1	3rd Circuit	0
California	244	Michigan	1	Rhode Island	0	4th Circuit	0
Colorado	20	Minnesota	1	South Carolina	0	5th Circuit	42
Connecticut	0	Mississippi	1	South Dakota	0	6th Circuit	1
Delaware	0	Missouri	0	Tennessee	2	7th Circuit	2
District of Columbia	103	Montana	9	Texas	2	8th Circuit	3
Florida	11	Nebraska	2	Utah	0	9th Circuit	218
Georgia	5	Nevada	5	Vermont	0	10th Circuit	14
Guam	1	New Hampshire	1	Virgin Islands	1	11th Circuit	12
Hawaii	17	New Jersey	0	Virginia	0	D.C. Circuit	62
Idaho	7	New Mexico	12	Washington	15		
Illinois	0	New York	1	West Virginia	0	**COURT OF APPEALS TOTAL**	**352**
Indiana	0	North Carolina	0	Wisconsin	1		
Iowa	0	North Dakota	0	Wyoming	1	U.S. Supreme Court	2
Kansas	0	Northern Mariana Islands	0				
Kentucky	1	Ohio	0	**DISTRICT COURT TOTAL**	**606**	**OVERALL TOTAL**	**965**

Methodology Used to Generate Above Data: This information was obtained using the Public Access to the Court Electronic Records ("PACER") system and performing a query for "Center for Biological Diversity" as a party in each of the federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER "National Case Locator" function was utilized to search for cases in which Center for Biological Diversity was a party that were filed on or after November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

Exhibit B
to
Kent Holsinger Testimony
April 8, 2014

WildEarth Guardians Litigation 1990 – Present

This table summarizes the number of cases in U.S. Federal Court system in which the WildEarth Guardians has been a party.

Alabama	1	Louisiana	0	Oklahoma	1	Fed. Claims Court	0
Alaska	0	Maine	0	Oregon	0	1st Circuit	0
Arizona	34	Maryland	0	Pennsylvania	0	2nd Circuit	0
Arkansas	0	Massachusetts	0	Puerto Rico	0	3rd Circuit	0
California	11	Michigan	0	Rhode Island	0	4th Circuit	0
Colorado	61	Minnesota	0	South Carolina	0	5th Circuit	0
Connecticut	0	Mississippi	0	South Dakota	2	6th Circuit	0
Delaware	0	Missouri	0	Tennessee	5	7th Circuit	0
District of Columbia	50	Montana	5	Texas	2	8th Circuit	1
Florida	1	Nebraska	0	Utah	1	9th Circuit	30
Georgia	0	Nevada	3	Vermont	1	10th Circuit	62
Guam	0	New Hampshire	0	Virgin Islands	0	11th Circuit	0
Hawaii	1	New Jersey	0	Virginia	0	D.C. Circuit	9
Idaho	4	New Mexico	112	Washington	1		
Illinois	0	New York	0	West Virginia	0	**COURT OF APPEALS TOTAL**	**102**
Indiana	0	North Carolina	0	Wisconsin	0		
Iowa	0	North Dakota	0	Wyoming	1	U.S. Supreme Court	0
Kansas	0	Northern Mariana Islands	0				
Kentucky	0	Ohio	0	**DISTRICT COURT TOTAL**	**301**	**OVERALL TOTAL**	**403**

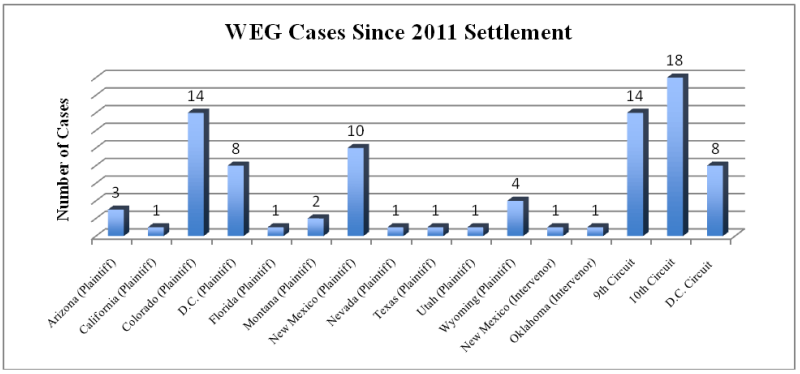
Methodology Used to Generate Above Data: This information was obtained using the Public Access to the Court Electronic Records ("PACER") system and performing a query for "WildEarth Guardians" as a party in each of the federal district courts, courts of appeal, and the U.S. Supreme Court. The earliest case included in this data was filed in 1990. The search using this method was finished on November 12, 2013. In order to update the information, the PACER "National Case Locator" function was utilized to search for cases in which WildEarth Guardians was a party that were filed on or after November 13, 2013 to April 4, 2014. These cases were then added to the numbers generated using the former method.

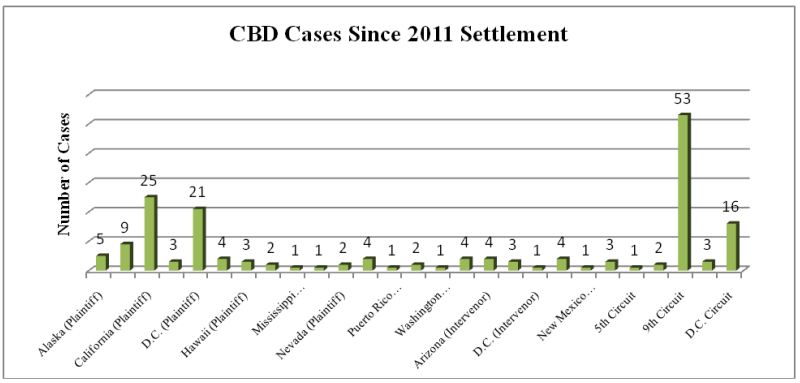
EXHIBIT C

to

Kent Holsinger Testimony
April 8, 2014

WEG Litigation Since 2011 Settlement		CBD Litigation Since 2011 Settlement	
District Court Cases with WEG as Plaintiff:	46	District Court Cases with CBD as Plaintiff:	84
District Court Cases where WEG Intervened:	17	District Court Cases where CBD Intervened:	17
Appeals Commenced with WEG as a Party:	78	Appeals Commenced with CBD as a Party:	78
Total:	**88**	**Total:**	**179**





Methodology Used to Generate Above Data: Using Public Access to Court Electronic Records ("PACER") under the search function "National Case Locator" we performed a keyword search in the "Party Name" box for "Wildearth Guardians" ("WEG") or "Center for Biological Diversity" ("CBD"). We limited the search results to cases filed *after* the entry of the settlements in *In Re Endangered Species Act Section 4 Deadline Litigation*; the WEG settlement was entered on May 10, 2011 and the CBD settlement was entered July 12, 2011. We then downloaded the results. Next, we eliminated cases where WEG or CBD participated in the case as a defendant, interested party, or was denied intervention. We then sorted the results into the role of the organization (*e.g.*, plaintiff, intervenor, etc.) and the court where the case was filed. Finally, we performed summations and created tables and charts (above) to display the results.

Mrs. LUMMIS. I thank you, and want to thank all of our panelists for their testimony. The Members will now have questions for you. Each will receive 5 minutes to ask questions. The Chair will begin by recognizing herself.

Ms. Budd-Falen, did the multi-species settlement in the 1990s help or hinder the agency's ability to manage its workload, in your opinion?

Ms. BUDD-FALEN. Actually, in the opinion of the Fish and Wildlife Service itself it hindered their ability to manage their workload. Particularly toward the end, when the listing priority guidance was filed, the Service was concerned that dealing with the backlog of the species under the settlement agreement was going to create a backlog of considering current petition, and the Service itself said that it was not going to allow this backlog to continue. That is why the listing priority guidance was issued in the first place.

Mrs. LUMMIS. Do we run the same risk with the current mega-settlement, since there is no limitation on groups continuing to submit listing petitions?

Ms. BUDD-FALEN. Actually, I believe that the backlog and the risk is worse. The original settlement only had 443 species. The current mega-settlement has 1,053 actions. So you have dramatically increased the number of backlogged cases that they have to deal with, as well as the Center for Biological Diversity and Wild Earth Guardians continuing to petition more and more species, which just puts the agency further and further behind.

Mrs. LUMMIS. Mr. Bean, I used to be on the Interior Appropriations Subcommittee. And how do you develop a budget when you don't know how much you will be spending annually on litigation and attorney's fees? Because this comes out of your—well, out of U.S. Fish and Wildlife Service's budget.

Mr. BEAN. Some of the fees come out of our budget, some come out of the judgment fund, which is not Fish and Wildlife Service——

Mrs. LUMMIS. Exactly. But the judgment fund has money in it, whereas, when it comes out of your—U.S. Fish and Wildlife Service budget, that comes out of the agency's appropriated budget.

Mr. BEAN. I believe, in the case of these deadline suits, that they do not come out of the agency budget.

Mrs. LUMMIS. That is just the opposite of what I was told by Director Ashe when I was on the committee. Now, did you make a distinction that I misunderstood?

Mr. BEAN. I am not sure what Director Ashe may have said. My understanding is that the attorney's fees paid in the deadline suits are paid from the judgment fund.

Mrs. LUMMIS. OK, a deadline suit being different from some of these mega-settlements.

Mr. BEAN. No, the mega-settlements all—the MDL settlement, as we call it, dealt only with deadline cases.

Mrs. LUMMIS. OK. So if it is true that mega-settlements are paid out of the judgment fund, what types of litigation are paid for out of the agency's budget, in terms of reimbursing lawyers?

Mr. BEAN. Yes, my understanding is if the Fish and Wildlife Service is sued under the Administrative Procedure Act for——

Mrs. LUMMIS. Missing deadlines.

Mr. BEAN. Not for missing deadlines, but for discretionary actions that are alleged to be arbitrary and capricious, if we lose those cases we pay out of our agency funds.

Mrs. LUMMIS. OK. So do you just guess about how many settlements of those kinds of suits there will be every year, where your budget is actually tapped?

Mr. BEAN. I don't know the precise process. My assumption is the Fish and Wildlife Service looks to the past as a guide to the future, and anticipates based on past experience.

Mrs. LUMMIS. OK. At this time I am going to recognize the Ranking Member for 5 minutes.

Mr. GRIJALVA. Thank you. Mr. Percival, do you agree with the statement that was just made, that the ability to file citizens suits has made ESA essentially a situation where those suits are robbing species—that we are robbing species protection to pay for litigation, and pay attorney's fees?

Mr. PERCIVAL. No, definitely not. Citizen suit provisions are sometimes the only lawyer the species has, if it is not adequately being dealt with, or being ignored by the agency.

Mr. GRIJALVA. You know, and just a quick follow-up on citizen suits. You know, suing the government is as American as apple pie. And the issue is litigation in terms of education, voting rights, health care that just went to the Supreme Court, where citizens brought that to that court, seeing it as a last resort. So it is not a unique situation that we are talking about in this instance with ESA. And if you could, just expand on that.

Mr. PERCIVAL. It is certainly not unique under American law. It is one of the aspects of American law that makes our system the envy of the world. In the last several years I have done a tremendous amount of work in China, where they have immense environmental problems. And the Chinese environmentalists realize that the one thing they are never going to be able to do is to sue their national government to enforce the environmental laws. And that is one aspect of U.S. environmental law that they would love to be able to have.

Mr. GRIJALVA. Thank you. Ms. Budd-Falen, while you have repeatedly challenged the merits of the attorney's fees recovered by environmental organizations, in 2001 your firm received 100,000 in fees under the New Mexico Cattle Growers Association case brought under the Endangered Species Act; 2005, again, Cattle Growers against Fish and Wildlife, 59,000 in fees, Section 11(g) of ESA; in 2006, 165,000 in fees, 4,500 in costs under the Equal Access to Justice Act and the ESA in the Nebraska Habitat Conservation. Can you tell this committee whether there have been other ESA-related cases, where you successfully recovered fees? And how much recovered, either under ESA or Equal Access to Justice Act?

Ms. BUDD-FALEN. Mr. Grijalva, I believe that you have listed the ESA cases. We have settled other cases with regard to getting EAJA funds.

But you are totally mischaracterizing my testimony. I am not arguing that the Endangered Species Act citizen suit provision should be eliminated. I am not arguing that attorney's fees shouldn't be paid under the Equal Access to Justice Act. What I am arguing, and what I have offered on behalf of every client that I have received fees from is that those ought to be transparent to the public. Those fees are American taxpayer dollars. And if my clients receive

them, the public should know. If the Center for Biological Diversity receives them, they should——

Mr. GRIJALVA. You are saying they should come out of Equal Access—that the payments should be capped under the Equal Access, right?

Ms. BUDD-FALEN. Under the Equal Access to Justice Act they are already capped at——

Mr. GRIJALVA. I know, and so—not out of the judgment fund.

Ms. BUDD-FALEN. That is correct.

Mr. GRIJALVA. So, if the cases you litigated are under the suit provisions of ESA, that section that is not capped, 11(g), were you able to avail yourself of unlimited and unreasonable fees, as you claim other litigants under the same provision, in citizen suits, are doing so?

Ms. BUDD-FALEN. Actually, if you look at the petitions that we filed, we requested our regular attorney's fees. My maximum hourly rate, as of 2014, is——

Mr. GRIJALVA. Well, it is a goose and gander question. Because if it is—we are assuming, then, that other organizations, whether it be the Center for Biological Diversity—are somehow playing the system and not doing the practices that you are doing. So, therefore, you are not availing yourself of unlimited fees and collections there, the assumption can be that potentially no one else is, either.

Ms. BUDD-FALEN. I strongly disagree with you. If you look at the last attorney's fees request from Earth Justice—maybe it wasn't the last, but it was a recent one——

Mr. GRIJALVA. OK.

Ms. BUDD-FALEN [continuing]. They requested $775 an hour for attorney's fees. There is not an attorney in the United States worth $775 an hour——

Mr. GRIJALVA. Let me just—if I can wrap up, Madam Chair, I have similar questions for Mr. Holsinger, relative to his fees, and relative to the collection of those fees, including a thing yesterday, which was $600 an hour per page, $6,000. I have those. I will submit those for appropriate answers following the goose and gander scenario that I am trying to ask about. Thank you.

Mrs. LUMMIS. The gentleman's time is expired. And before the Chair recognizes the gentleman from Utah for 5 minutes, I would like to ask the staff to put up the chart on the Center for Biological Diversity litigation 1990 to present. Thank you very much.

The Chair recognizes the gentleman from Utah, Mr. Bishop.

Mr. BISHOP. Thank you. And you recognized me on the first guess, too. I appreciate that.

We had in the first panel a whole lot of talk about the kinds of data that are used. So, Ms. Budd-Falen, if I could ask you, first question about data. Are critical habitat designations only limited to natural features?

Ms. BUDD-FALEN. No, your Honor. Actually, there has—I am sorry. I am so used to court.

[Laughter.]

Mr. BISHOP. And from now on, Grijalva is going to use that all the time. I appreciate it.

[Laughter.]

Ms. BUDD-FALEN. Actually, we recently had a decision by the U.S. Fish and Wildlife Service on the Chiricahua leopard frog. That Chiricahua leopard frog critical habitat designation includes man-made stock tanks created by ranchers in the 1930s and 1940s. Those ranchers in Arizona are now being told that they have to ensure pH and all of these different criteria for water tanks that they developed that is now critical habitat. Those frogs wouldn't be there, had it been for the ranchers, and they are trying to cut the ranchers' ability to use their grazing allotments.

Mr. BISHOP. All right, I appreciate that. Let me follow up with another question to you on a different track of what the second panel is more interested in doing.

The second—I am sorry. The administration says that it wants to explore administrative options to track costs. Why is legislation necessary to achieve this, Ms. Falen?

Ms. BUDD-FALEN. Because, quite frankly, the administration is doing a terrible job at tracking costs, even according to the GAO reports that have come out. The GAO reports very clearly state the Department of Justice does not clearly track these costs. It also stated that, with regard to the USDA and the recent report that came out on that, as well as the EPA and the GAO report on that.

And, in my own experience, when we filed a Freedom of Information Act request with Department of Justice asking for all of the cases filed by a certain environmental group in one Federal district court in a certain period of time, when we compared the docket sheets with the Federal court database, they missed 23 cases.

Mr. BISHOP. OK. So to both you and Mr. Holsinger, does anything in H.R. 4316 or the other bill—I can't remember the number right now—prohibit litigants from suing the Federal Government on ESEA? ESA, I am sorry.

Ms. BUDD-FALEN. Absolutely not. And I think the idea that—claiming that this is somehow harming the citizen suit provision is just a red herring, because people are so afraid to modernize the ESA.

Mr. BISHOP. Mr. Holsinger?

Mr. HOLSINGER. I would echo that. There is absolutely no prohibition. And I would liken back to Congressman Grijalva's comment that litigation is like apple pie. Well, if that is the case, then CBD and Wild Earth Guardians have had 1,366 servings, and that is outrageous.

Mr. BISHOP. Thank you. And I wish you could do the same thing on ESEA, which is another pain I have to bear. But I am a teacher, so forget that one.

[Laughter.]

Mr. BISHOP. Can I—again, to the two of you, Mr. Holsinger and Ms. Falen, one of your colleagues there has testified that H.R. 4318 discourages lawsuits by reducing taxpayer-financed attorney's fees. You have extensive experience with these kind of fees. This committee has found instances where environmental attorneys have charged the government over $500 per hour. And one attorney received exorbitant fees for successfully using the ESA to stop construction of an elementary school.

How do you address the argument that attorneys should not live under the same attorney's fee standard as the Equal Access to Justice Act?

Ms. BUDD-FALEN. Actually, I do not think that there is a justification. The Equal Access to Justice Act has the same purpose as the fee shifting provisions under the citizen suit provision, which is to reimburse reasonable attorney's fees. It was not a get-rich-quick, make-a-lot-of-money-for-your-organization proposition.

The Equal Access to Justice Act attorney's fees have been updated. They are now approximately $200 an hour, considering cost of living and all that other kind of requirements. I see no reason that an attorney for a veteran should be treated any different than an attorney for a tree or a rock.

Mr. BISHOP. All right, thank you. Mr. Holsinger, 30 seconds or less.

Mr. HOLSINGER. I can say, as an attorney in private practice, that my practice is nowhere near as lucrative as some of the outrageous fees that we have heard about today.

Mr. BISHOP. Thank you. And Mr. Bean, I actually had one last question for you. Unfortunately, I have 20 seconds, and it would have fit better in the first panel anyway, so next time you come up here you've got it coming.

Mr. BEAN. Beg your pardon, sir?

Mr. BISHOP. I am sorry. I will save it until the next time you come up here.

Mr. BEAN. OK. Thank you, sir.

Mr. BISHOP. Yield back.

Mrs. LUMMIS. I thank the gentleman and recognize the gentleman from Montana, Mr. Daines.

Mr. DAINES. Thank you, Madam Chairwoman. In Montana, we know too well how land management actions by Federal agencies are halted, due to habitual litigants. This is all to the detriment of responsible resource management and our local economies. From providing timely renewals of recreation permits, to approving much-needed timber sales, or preventative treatments for catastrophic wildfire, Federal agencies spend millions of dollars analyzing their decisions to bullet-proof them from lawsuits that are then only halted in court.

You know, in Montana national forests cover about 15 million acres. That is about 60 percent of the total forested acreage in the State. But timber sales on national forests have declined by 58 percent since 2009. And, meanwhile, our timber mills are obtaining logs hundreds of miles away from their mills to keep their business afloat, while their resources deteriorate in our Montana forests.

In fact, I was up in Lincoln County, met with a couple from Eureka, Montana at dinner, and they shared with me. They said, "We describe this part of the State any more as poverty with a view." The poverty rates in our forested counties in Montana are well above the State average. In fact, in Lincoln County, 75 percent of the ground up there is owned by the Federal Government, and the unemployment rate is 15.2 percent.

Now, the Alliance for the Wild Rockies, one of these environmental groups that file lawsuits, they filed an injunction of timber

sale in the Little Belt of Montana, based on the lynx habitat impact. This sale could have provided logs to a mill in Montana.

The more resources spent on analyzing decisions, fighting in court, not only waste taxpayer dollars, but reduces the value of the resource, and kills jobs in rural communities. Additionally, after these decisions are made, the taxpayers foot the bill for the attorney's fees. In fact, the Alliance for Wild Rockies challenged the Cabin Gulch Vegetation Management Project, a project intended to treat beetle-infested trees. These are trees that have died in the Big Belt Mountains in Montana. This 9th Circuit that is referred to here on the screen, the 9th Circuit Court judge upheld the Forest Service actions—upheld the Forest Service actions—in 11 of the 12 counts. But they halted the project, due to potential impact on lynx habitat.

And then here is what happened, to add insult to injury. The Federal judge awarded 100 percent of the attorney's fees, requested at a rate in excess of the normal fee, despite the Forest Service challenge. The court paid $300 an hour, instead of the standard Montana rate of $220 an hour. And although the Forest Service prevailed in 11 of the 12 counts—that is not too bad a batting average—the Forest Service must now pay $72,000 in attorney fees. Those are taxpayer dollars.

Karen, maybe we could start with you. Could you tell me what effect does litigation and attorney's fees, pay-outs, have on actual species recovery?

Ms. BUDD-FALEN. Absolutely none. The problem is the money isn't going to on-the-ground projects or on-the-ground improvement for the species. It is simply going to pay attorneys to file more litigation to stop more projects that are happening on the ground.

Mr. DAINES. Mr. Holsinger, you know, we are making some pretty rich apple pies up there in Montana, based on your analogy there. Could you comment on that?

Mr. HOLSINGER. Yes, Congressman. I would echo Ms. Falen. I have personal knowledge of working with the Upper Colorado River Recovery Program, an effective program to help recover and de-list species in the Colorado River. They were faced with litigation filed against them, much like we are talking about today. And I can tell you that tied them up for years in responding to the document requests and the huge burdens of litigation. It prevented them from doing their jobs, which were to try to recover the listed fish in the Colorado River. I am sure that plays over time and time again.

And I am, frankly, mind-boggled. I have a great deal of respect for Mr. Bean. I am stymied that he would devote only a sentence of his oral remarks on this litigation issue. And, Mr. Rauch, who I did not know until today, as far as I could tell, virtually ignored it.

Mr. DAINES. I have to tell you. I was at a mill recently in southwest Montana, and we only have 9 timber mills left in Montana; we used to have 30. Working with these hard-working Montanans, they are looking at having to go 450 miles away for a timber sale right now, out of State and, by the way, outside the 9th Circuit jurisdiction, to get logs.

As we are having this conversation, looking at a hillside of dead trees on national forests, killed by beetles, next to a hillside that

had been wiped out by a forest fire that we still have recoverable timber, and we couldn't go up there and harvest it, and having to travel over 500 miles to get logs to supply the mill—I see my time is up, Madam Chairwoman.

Mrs. LUMMIS. Yes, the gentleman's time is expired. We will have a second round. Each Member will be asked to limit themselves to one question. The Chair recognizes herself.

There has been a lot of concern expressed on the first panel about how data transparency might jeopardize proprietary data. And we know that medical and other scientific fields have dealt with the issue of proprietary data versus transparency for non-proprietary data and protected personal data.

Ms. Budd-Falen, have voluntary efforts to conserve the sage-grouse, including candidate conservation agreements, been undermined by the reluctance of the Federal Government to protect proprietary data in the case of land owners' personal data?

Ms. BUDD-FALEN. Absolutely. And I find that a totally fascinating subject here, because you have the Federal agencies on one hand, saying that we have to protect all this data on which the decisions are made, yet, for example, on the sage-grouse CCAA in Oregon that we are trying to do, the Fish and Wildlife Service is saying that if a land owner signs up to voluntarily do species protection, that all of his data is subject to FOIA, and that that can go out.

And so, it really seems a conflict to me. And the idea that the Fish and Wildlife Service just voluntarily gives this data is truly laughable to a lot of us, because under FOIA is the only way that you know that you get all of the information in data. When they just voluntarily release it, you have no idea if they are cherry-picking the data, or if they are cherry-picking the information.

And so, to say that the current system is working with regard to the release of data is simply not correct and not transparent at all.

Mrs. LUMMIS. Thank you. The Chair's time has expired. The Chair recognizes the Ranking Member, Mr. Grijalva.

Mr. GRIJALVA. Thank you, and the issue of proprietary is confusing to me. The fluids and chemicals used in fracking are proprietary. And, therefore, that shouldn't be released. But data that somebody might consider proprietary in ESA, that shouldn't be protected.

Anyway, Mr. Percival, what authority—third factor in this discussion. What authority do the Federal courts have to ensure that attorney fees, awards are reasonable, and only provided when appropriate under the citizen suit provision of ESA? And are the Federal courts vigorous in vetting that process?

Mr. PERCIVAL. Yes, it is definitely the case that the Supreme Court in the Ruckelshaus case, as I mention in my testimony, said that before any party could be eligible for an attorney's fee they had to be a prevailing party. And that means you have to win some aspect of the lawsuit before you can even be eligible to apply for the attorney's fees.

Then, the standard for receiving attorney's fees under the attorney's fees shifting provision of the Endangered Species Act requires that the court determine that the fee is reasonable. So, in each of

these cases where attorney's fees awards have been made that some are touting as outrageous, you had a member of the independent, neutral, Federal judiciary determining, based upon an assessment of the amount of work and skill that went into the litigation, that that fee award was reasonable. And those are very important safeguards that ensure that fee awards are not outrageous windfalls to plaintiffs who bring non-meritorious litigation.

Mr. GRIJALVA. Thank you. Yield back, Madam Chair.

Mrs. LUMMIS. I thank the Ranking Member. The gentleman from Utah is recognized for one question.

Mr. BISHOP. Thank you. I have a three-parter.

[Laughter.]

Mr. BISHOP. I am sorry. Mr. Bean, I have a chance to ask you the question, after all. So, during the hearing last August I was able to ask Director Ashe if it would be both possible and preferable that actual data be used for ESA decisions that affect both species and people, and should be available for everyone to see online and on the Internet. And he answered, clearly, yes. That is the verbiage that is up there.

So, for A, just for the record, I would like to get—is your answer yes or no to that same question?

Mr. BEAN. I would answer the same way.

Mr. BISHOP. OK. So then, B, I further asked Mr. Ashe, then, that the Fish and Wildlife Service would look at the very questionable data that was referenced in a letter from Fish and Wildlife to the State of Utah relating to the greater sage-grouse, namely relating to tall structures, buffers, and disturbance limits. The concern for many of the States, including Utah, was intensified last week when Secretary Jewell alluded to a scenario where 40 regulations might be used in the event the sage-grouse is listed.

So, instead of that, why shouldn't the Department of the Interior simply make good on its stated purpose of endorsing the State plans, and keep it off list in the first place?

Mr. BEAN. The Fish and Wildlife Service has made no decision about whether the sage-grouse will go on the list or not. I will not make that decision, will not propose a decision, until September of 2015.

Mr. BISHOP. All right. Then, in that case, my question is rhetorical, and obviously, preferable than doing the 4(d) speculation that could be taking place. States have done a great job, they need to have their data there.

And my part C, I need to ask if the Chairlady would be kind enough to tell me what my part C is.

Mrs. LUMMIS. Oh, I thank the gentleman. Part C would be addressed to the gentleman from Denver regarding why the 9th Circuit is the preferred circuit for the Center for Biological Diversity and other environmental litigants.

Mr. BISHOP. I knew that.

[Laughter.]

Mr. HOLSINGER. Thank you, Madam Chair, Congressman. You know, one can only speculate, but it is commonly known that the 9th Circuit is the most commonly over-turned circuit in all of the U.S. court system. I think these litigants are picking their venues.

Mr. BISHOP. With that, I yield back.

Mrs. LUMMIS. I thank the gentleman. And I thank the panel. This has been a productive hearing. It follows a year's worth of hearings to develop the legislation that you see before you. And I appreciate the panel's feedback on the legislation you see before you, now that it has been drafted.

As I mentioned before, Members will have additional questions for witnesses, possibly, and we ask that you respond to these in writing. The hearing record will be open for 10 business days to receive these responses.

Now, with our tremendous gratitude to the people who are here today—because we know how much time it takes to get to Washington and to prepare the testimony you have presented today—we want you to know we are extremely grateful for your input. If there is no further business, without objection, the committee stands adjourned.

[Whereupon, at 12:43 p.m., the committee was adjourned.]